Supreme Court, U.S.
FILED
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OFFICE OF

No. _____

In The

Supreme Court of the United States

MICHAEL JOHN BAK,

Petitioner,

v.

PEOPLE OF REDFORD TOWNSHIP,

Respondent.

On Petition For Writ Of Certiorari To The State Of Michigan, Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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80pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT'S ADMISSION OF CONTACTS BETWEEN THE DEFENDANT AND COMPLAINANT, OR COMPLAINANT'S FAMILY, PRIOR TO THE ENACTMENT OF THE STALKING STATUTE VIOLATED THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION, DEPRIVING PETITIONER OF DUE PROCESS, REQUIRING REVERSAL?

II. WHETHER THE STALKING STATUTE AS APPLIED TO THE FACTS IN THIS CASE IS VOID FOR VAGUENESS AND UNCONSTITUTIONALLY OVERBROAD WHERE: (A) PETITIONER'S CONDUCT IS PROTECTED BY THE FIRST AMENDMENT; AND (B) PETITIONER DID NOT HAVE FAIR NOTICE OF PROSCRIBED CONDUCT?

III. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL, WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED ESTABLISHING THE ELEMENTS OF THE CRIME OF STALKING?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Basis of Jurisdiction in this Court	1
Constitutional Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Writ	10
I. THE TRIAL COURT'S ADMISSION OF CONTACTS BETWEEN THE PETITIONER AND COMPLAINANT, OR COMPLAINANT'S FAMILY, PRIOR TO THE ENACTMENT OF THE STALKING STATUTE VIOLATED THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION DEPRIVING PETITIONER OF DUE PROCESS, REQUIRING REVERSAL	10
II. THE STALKING STATUTE AS APPLIED TO THE FACTS IN THIS CASE IS VOID FOR VAGUENESS AND UNCONSTITUTIONALLY OVERBROAD WHERE: (A) PETITIONER'S CONDUCT IS PROTECTED BY THE FIRST AMENDMENT; AND (B) PETITIONER DID NOT HAVE FAIR NOTICE OF PROSCRIBED CONDUCT	15
III. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL, WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED ESTABLISHING THE ELEMENTS OF THE CRIME OF STALKING	23
Conclusion	30

INDEX TO APPENDICES

Appendix A

Opinion and Order of the Michigan Court of Appeals affirming Petitioner's Judgment of Conviction .....App. 1

Appendix B

Trial Court conclusions of law on Petitioner's Pre-Trial Motion to Dismiss.....App. 8

Appendix C

Trial Court conclusions of law on Petitioner's Motion in Limine.....App. 11

Appendix D

Third Circuit Court Opinion and Order affirming Petitioner's Judgment of Conviction.....App. 17

Appendix E

Third Circuit Court Order Denying Petitioner's Motion for Reconsideration .....App. 37

Appendix F

Michigan Court of Appeals Order Denying Petitioner's Delayed Application for Leave to Appeal.....App. 39

Appendix G

Michigan Supreme Court Order Remanding to Michigan Court of Appeals for Consideration as on Leave Granted .....App. 40

Appendix H

Michigan Court of Appeals Order Denying Rehearing .....App. 41

Appendix I

Michigan Supreme Court Order Denying Leave to Appeal (from Appendix A) .....App. 42

TABLE OF AUTHORITIES

Page

CASES

Belle Maer Harbor v. Charter Township of Harrison, 170 F.3d 553 (6th Cir. 1999) 18, 29

Broadrick v. Oklahoma, 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973) 18, 21, 22

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1977) 24

Chicago v. Morales, 527 U.S. 41 (1999) 18

Colautti v. Franklin, 439 U.S. 379 (1979) 19

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 566 (1979) 25

Kolender v. Lawson, 461 U.S. 352 (1983) 19

People v. Ford, 417 Mich. 66, 331 N.W.2d 878 (1982) 19

People v. Gagnon, 129 Mich. App. 678, 341 N.W.2d 867 (1983) 19

People v. Hampton, 407 Mich. 354, 285 N.W.2d 284 (1979), *cert. denied*, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 110 (1980) 25, 29

People v. Herbert, 444 Mich. 466, 511 N.W.2d 654 (1993) 25

People v. Kieronski, 214 Mich. App. 222, 542 N.W.2d 339 (Mich. Ct. App. 1995) 20, 25, 26, 27

People v. Matthews, 53 Mich. App. 232, 218 N.W.2d 838 (1974) 25

People v. Moon, 125 Mich. App. 773, 337 N.W.2d 293 (1983) 11

TABLE OF AUTHORITIES – Continued

Page

People v. Potter, 115 Mich. App. 116, 320 N.W.2d 313 (1982) 2, 5, 30

People v. Potts, 181 Mich. App. 311, 448 N.W.2d 820 (1989) 11

People v. Slocum, 213 Mich. App. 239, 539 N.W.2d 572 (1995) 11

People v. Smith, 75 Mich. App. 64, 254 N.W.2d 654 (1977) 18

People v. White, 536 N.W.2d 876 (Mich. Ct. App. 1995) 19, 20, 26, 27

People v. Wilson, 139 Mich. App. 205, 362 N.W.2d 798 (1984) 19

Staley v. Jones, 108 F. Supp. 2d 777 (W.D. Mich. 2000) 20, 21

Staley v. Kurt Jones, 239 F.3d 769 (6th Cir. 2001) 19, 20, 21, 22

Williams v. Taylor, 120 S. Ct. 1495 (2000) 24

CONSTITUTIONS

Article I, § 10 of the United States Constitution ... 1, 11

First Amendment, U.S. Constitution ... 1, 15, 18, 19, 21, 22

Fifth Amendment, U.S. Constitution ..... *passim*

Sixth Amendment, U.S. Constitution ..... *passim*

Fourteenth Amendment, U.S. Constitution 2, 24

Article I, § 20 of the Michigan Constitution 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

RULES AND ORDINANCES

Redford Township Ordinance § 58-60 .....3, 15

Supreme Court Rule 10(c) 1

Supreme Court Rule 13.1 1

OTHER AUTHORITIES

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) 10, 15, 23, 24

Black's Law Dictionary 1417 (5th ed. 1979)..... 29

OPINIONS BELOW

The opinions of the Courts below are unpublished, and have not been designated for publication.

BASIS OF JURISDICTION IN THIS COURT

The judgment of the Michigan Supreme Court was entered on June 26, 2001. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10(c).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article I, § 10, Clause 1 provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Constitution, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment XIV, § 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner (hereinafter referred to as Mr. Bak), charged with stalking in violation of Redford Township Ordinance § 58-60[1], was jury-convicted in the 17th District Court for the State of Michigan on August 11, 1995, the Honorable Karen S. Khalil presiding. Mr. Bak was sentenced to serve a term of probation.

Prior to trial, Mr. Bak's counsel argued a Motion to Dismiss the stalking charge on the grounds that the Redford Township statute was unconstitutionally vague and overbroad. Further, Mr. Bak argued that the Ordinance created an unconstitutional burden of proof denying him due process of law. The trial court denied Mr. Bak's Motion, concluding that the Redford Township stalking statute was not overly broad or vague (Appendix B, App. 8-9).

Jury trial in the matter commenced on August 11, 1995. Prior to trial, defense counsel brought a motion to exclude from evidence alleged incidents between the complainant and Mr. Bak which had occurred prior to the enactment of either the Redford Township Stalking Ordinance or the Michigan Stalking Statute in 1993. Defense counsel argued that admission of such incidents, which

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[1] Redford Township Ordinance § 58-60 was enacted in June 1993.

were not criminal at the time they were allegedly committed, violated the *ex post facto* clause of both the United States and Michigan Constitutions. Also, Defense counsel argued that any warnings made by the complainant or the complainant's family to Mr. Bak to stay away from the complainant prior to the Statute's enactment should be held inadmissible. The trial court granted Mr. Bak's motion in part, excluding from evidence any contact Mr. Bak had with the complainant prior to the Statute's enactment (Appendix C, App. 11-12). Additionally, the trial court ruled that it would not allow any testimony related to contacts Mr. Bak had with other children (Appendix C, App. 11-12). The trial court did indicate, however, that it would allow testimony from the complainant's father, specifically that, on one occasion prior to the statute's enactment, he told Mr. Bak to have no contact with his daughter (Appendix C, App. 11-16).

Kelly Ann McHenry, the complainant, was the first witness for the prosecution. Giving context to the relationship between complainant and Mr. Bak, she testified that she first met Mr. Bak as a ten-year-old fifth grader attending St. Robert Bellermine School. According to the witness, Mr. Bak worked at the parish basketball games she attended at St. Robert. The complainant acknowledged that when she first met Mr. Bak there was nothing out of the ordinary about their relationship – she was not afraid of him, nor did she tell him that she did not want him around her.

In September, 1993, complainant saw Mr. Bak at St. Robert's Fair. Mr. Bak approached her outside the carnival tent where the games for the fair were being held and offered her some stuffed animals that he had won at the

fair. At first, complainant told Mr. Bak that she did not want them, but when he persisted, she took the animals, went to her mother and told her mother of the gift.

During the next six months, complainant would see Mr. Bak at mass in church, with no contact between them.

In March, 1994, complainant was confirmed at St. Robert's Church, followed by a reception hosted by the church and held in the church gymnasium. The complainant agreed that the reception was for parents and friends of the persons being confirmed. At this reception, Mr. Bak approached her and said "hi" or "congratulations" to her, at which time she turned and walked away.

On March 18, 1994, the complainant received an unsigned birthday card, reading, "God bless you on your birthday and always". It also said, "The Lord bless and keep you, the Lord make his face shine upon you and be gracious to you." Around the same time, the complainant also received an unsigned Confirmation card, reading, "for someone special as she graduates," that included a prayer in it stating, "I said a prayer for you today".

The complainant testified that for the six months subsequent to her Confirmation and receiving of cards, she saw Mr. Bak in Church, but that he did not talk to her or approach her.

In September 1994, the complainant, who was now fourteen years old, was at St. Robert's Fair when Mr. Bak approached and spoke to her, saying that he would like to talk to her. The complainant told him that she did not want to speak with him, at which point Mr. Bak responded, "I won't say anything wrong, I just need to

talk to you." She testified that she told Mr. Bak three to four times that she did not want to talk to him, and left to find a police officer because she was scared.

On cross-examination, the complainant recanted her prior testimony and admitted that she did not tell Mr. Bak that she did not want to talk to him. Further, the complainant acknowledged that at the 1994 fair, Mr. Bak did not grab her, threaten her, make sexually suggestive comments to her, or come after her when she left him to find a police officer. She also admitted that she did not tell Mr. Bak that she was scared of him.

The complainant testified that throughout these church events, Mr. Bak never touched her in an inappropriate or sexual manner, nor did he make inappropriate or sexual remarks to her. Mr. Bak never threatened her, threatened to get even with her, nor did he ever raise his voice or talk mean to her.

The final question to complainant during cross-examination was:

> Q. Other than sending you some nice cards and giving you some teddy bears and saying hello once in a while, that's the only contact you've had with Mr. Bak, right?
>
> A. Yes.

After cross-examination was completed, the prosecutor outside the presence of the jury, moved the trial court to allow him to introduce evidence of contacts that had occurred between the complainant and Mr. Bak prior to the enactment of the Stalking Statute, arguing that defense counsel had led the jury to believe that the only

contacts that Mr. Bak had had with the complainant were the ones that occurred subsequent to the Statute's enactment. Over objections from defense counsel and contrary to the trial court's own prior and explicit ruling, the trial court decided to allow the prosecution to ask the complainant about contacts which had occurred prior to 1993, the year of the Stalking Statute's enactment.

On redirect examination, the prosecution elicited from the complainant testimony concerning an event which occurred in 1992, prior to the enactment of the Redford Township Stalking Ordinance. The complainant testified that when she was twelve years old, Mr. Bak followed her and her friend home from school and had pulled at her friend's school bag causing her pencils to fall out. Mr. Bak apologized to the friend saying "I didn't mean to do that". After the pencils were picked up, the three of them continued walking and talking.

On re-cross-examination, the complainant admitted talking to Mr. Bak when he walked with her home from school. The complainant never told Mr. Bak that she was frightened of him or that he should stay away. Mr. Bak never threatened or touched her on the way home from school.

During closing argument, the prosecutor stressed to the jury that they must consider "the whole picture". And, during rebuttal, the prosecution specifically instructed the jury to consider "the whole picture," referring to the 1990 contact between Mr. Bak and complainant, and contacts by the police to Mr. Bak in 1989.

Defense counsel did not request a limiting instruction from the judge regarding the weight the jury should give

the 1990 contact. When the Court read the stalking instruction, the Court did not *sua sponte* instruct the jury to consider only those contacts after 1993 as evidence of a course of conduct.

On August 11, 1995, the jury found Mr. Bak guilty of stalking.

Mr. Bak appealed by right to the Wayne County Circuit Court, pursuant to Article 1, § 20 of the Michigan Constitution, MCR 1985, 7.101(B)(1). Mr. Bak, in his appeal of right raised three issues: 1) the trial court erred in denying the motion for a directed verdict of acquittal, where there was insufficient evidence presented establishing the elements of the crime of stalking; 2) the trial court's admission of acts which occurred prior to the enactment of the stalking ordinance violated the *ex post facto* clause of the United States and Michigan Constitutions; and 3) the Redford Township Stalking Statute is unconstitutionally vague and overbroad.

On March 26, 1996, Mr. Bak's conviction and sentence were affirmed in the Wayne County Circuit Court. A timely motion for rehearing/reconsideration was filed and ultimately denied by the Wayne County Circuit Court Judge hearing Mr. Bak's appeal of right.

On October 11, 1996, Defendant-Appellant filed a Delayed Application for Leave to Appeal in the Michigan Court of Appeals, raising four issues: 1) the trial court's admission of contacts between the Defendant and the Complainant prior to the enactment of the Stalking Ordinance violated the *ex post facto* provision of the United States Constitution; 2) the Stalking Ordinance as applied

to the facts of this case is void for vagueness and unconstitutionally overbroad where: (a) Petitioner's conduct was and is protected by the First Amendment; and (b) where Petitioner did not have fair notice of the proscribed conduct; 3) the trial court erred in denying the motion for a directed verdict of acquittal, where there was insufficient evidence presented establishing the element of the crime of stalking; and 4) Petitioner was denied his due process right to the effective assistance of trial counsel.

On March 15, 1997, the Michigan Court of Appeals entered an Order denying Defendant-Appellant's Application for Leave to Appeal.

Thereafter, Defendant-Appellant filed an Application for Leave to Appeal with the Michigan Supreme Court. On May 27, 1998, the Michigan Supreme Court entered an Order remanding this case to the Michigan Court of Appeals to consider this case on its merits.

On July 11, 2000, the Michigan Court of Appeals issued an Opinion and Order affirming Mr. Bak's conviction. Mr. Bak, through counsel, filed a Motion for Rehearing/Reconsideration in the Michigan Court of Appeals. On September 28, 2000, the Michigan Court of Appeals entered an Order Denying Mr. Bak's Motion for Reconsideration.

Mr. Bak then once again filed a Delayed Application for Leave to Appeal to the Michigan Supreme Court raising the same issues he had in the Michigan Court of Appeals. On June 26, 2001, the Michigan Supreme Court

entered an Order Denying Mr. Bak's Delayed Application for Leave to Appeal.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S ADMISSION OF CONTACTS BETWEEN THE PETITIONER AND COMPLAINANT, OR COMPLAINANT'S FAMILY, PRIOR TO THE ENACTMENT OF THE STALKING STATUTE VIOLATED THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION DEPRIVING PETITIONER OF DUE PROCESS, REQUIRING REVERSAL.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") governs federal habeas review of the state court judgment. Under the AEDPA, a writ will issue when the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

This case raises questions regarding the application of the *ex post facto* clause of the United States Constitution, where conduct occurring prior to a statute's enactment is prosecuted as criminal action. Petitioner submits that Respondent prosecuted conduct occurring prior to the enactment of the Redford Township Ordinance as criminal action because contacts subsequent to the enactment of the stalking statute, did not satisfy even the vague and overly broad definition of the crime in this ordinance, such to support the conviction herein. (Issue

II, herein). Therefore, admission into evidence of the contacts between the complainant and/or complainant's family and Petitioner prior to the enactment of the Redford Township Stalking Ordinance in 1993 violates the *ex post facto* clause of the United States Constitution. As such, Petitioner was denied a fair trial and his conviction should be reversed.

Prior to trial, defense counsel made a motion to exclude from evidence any contacts occurring between the complainant and the Petitioner prior to the enactment of the Redford Township Stalking Statute in 1993. Although the Court initially granted the motion, the Court reversed itself during trial and allowed into evidence such prior contacts.

Article I, § 10 of the United States Constitution states: "No . . . *ex post facto* Law" shall be passed. A criminal law is *ex post facto* where it is applied to events which occurred prior to its enactment and where it disadvantages the offender affected by the law. *People v. Potts*, 181 Mich. App. 311, 448 N.W.2d 820 (1989). A statute or ordinance which effects the prosecution or disposition of criminal cases involving an act committed prior to the effective date of the ordinance violates the *ex post facto* clauses of the United States and State Constitutions if *it makes punishable that which was not*, makes an act a more serious criminal offense, increases the punishment, or *allows the prosecution to convict on less evidence. People v. Slocum*, 213 Mich. App. 239, 539 N.W.2d 572 (1995); *People v. Moon*, 125 Mich. App. 773, 337 N.W.2d 293 (1983) (emphasis added).

In the present case, admission into evidence of the contact which occurred between Petitioner and the complainant prior to the enactment of the Redford Township Stalking Ordinance in 1993 violated the *ex post facto* clause because those contacts were prosecuted as criminal actions, providing the necessary grounds for the prosecution to argue a harassing course of conduct. In other words, the prosecution was able to convict the Petitioner with less or insufficient evidence, by making punishable that which was not, because he was not held to proving a harassing course of conduct occurring subsequent to the statute's enactment. Instead, once realizing the post-enactment conduct may not have the flavor of "harassment", he asked the trial court to overrule itself, so he could introduce and argue the pre-enactment contact as criminal.

The stated reason that the prosecutor made his motion to allow into evidence these past acts was because he felt that defense counsel had left the jury with the impression that the only contact occurring between the Petitioner and the complainant had occurred after passage of the stalking ordinance. In fact, defense counsel had not created any impression – the complainant's own testimony in response to cross-examination was subject to its own interpretation by the fact finder. Further, testimony bore out the context of Petitioner and complainant's relationship as co-church members and parishioners, pre-statute-enactment, therefore, other contacts were presumed to have occurred.

By allowing this evidence to be admitted, the trial court's ruling permitted the improper bolstering of the prosecution's case with evidence of acts that were not

subject to criminal scrutiny when they occurred. The danger Petitioner sought to avoid by seeking exclusion of these contacts, that the jury would confuse argumentation with the actual charge, occurred. Additionally, the introduction of these contacts combined with the prosecution's encouragement to convict Petitioner on the basis of these contacts, deprived Petitioner a fair trial and due process of law. The trial court's failure to exclude these acts from evidence violates the *ex post facto* clause of the Federal and State Constitutions, and thereby mandates reversal.

The Michigan Court of Appeals rejected Mr. Bak's *ex post facto* argument, reasoning that because the trial judge instructed the jury that, "the evidence must convince you beyond a reasonable doubt that the crime occurred between the dates of September 1993 and September 1994 within the Township of Redford," the jury presumably followed the instructions and did not use any of the contacts before the ordinance was enacted to support the conviction. (Appendix A).

Petitioner respectfully submits that the instruction in this case did not protect him from being convicted on the basis of contacts that occurred prior to the enactment of the ordinance. First, in order to convict the Defendant, the jury had to find that there were at least two contacts between the Defendant and the complainant, establishing a course of conduct, that would cause a reasonable person to feel emotional distress. It is probable that the jury utilized a contact that occurred prior to June 1993, the date the ordinance was enacted, in order to meet the "course of conduct" element. After all, the prosecution's argument inviting jurors to look to these contacts during

deliberation went without objection or curative instruction from the trial court.

Second, the prejudicial impact of allowing this testimony is facially apparent. The particular pre-enactment contact introduced, was the most unusual, in that it alleged that Defendant was "following the complainant home from school" and grabbed a schoolmate's arm, throwing her book bag to the ground. As such, the jury would have had the very difficult job of sifting out what must in fact be proven, after presented with irrelevant pre-enactment contacts, especially when the prosecutor urged the jury:

> "*You got to look at the whole picture.* You go back to when Mr. Bak is following Kelly home from school after being told not to, grabbing her friend's book bag and throwing it on the ground. The girls didn't want to have any contact with them. Their [sic] walking away. They see Mr. Bak and they start speeding up. And what does he do, he comes after them and grabs something from them. I think when you *consider – when you look at the instances of conduct that happened later on and when you consider that along with everything else that happened,* that would cause, that those instances would cause a reasonable person to feel threatened, harassed, and intimidated." (Trial Transcript 235-236, emphasis added).[2]

As such, the instruction given by the Court did not protect Petitioner from being convicted on the basis of

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[2] The transcript reveals that this incident occurred prior to the enactment of the ordinance. (See Trial Transcript pp. 72-95.)

conduct which occurred prior to enactment of the ordinance and, thus, renders his conviction unconstitutional in violation of the *ex post facto* clause.

II.

THE STALKING STATUTE AS APPLIED TO THE FACTS IN THIS CASE IS VOID FOR VAGUENESS AND UNCONSTITUTIONALLY OVERBROAD WHERE: (A) PETITIONER'S CONDUCT IS PROTECTED BY THE FIRST AMENDMENT; AND (B) PETITIONER DID NOT HAVE FAIR NOTICE OF PROSCRIBED CONDUCT.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") governs federal habeas review of the state court judgment. Under the AEDPA, a writ will issue when the state court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

This case raises questions regarding the language of the Redford Township Stalking Ordinance as void for vagueness and as being unconstitutionally overbroad in violation of the First Amendment.

The Redford Township Stalking Ordinance provides:

Sec. 58-60. Stalking.

(a) As used in this section:

Course of conduct means a patterns of conduct composed of a series of two or more separate noncontinuous acts, *evidencing a continuity of purpose.*

Emotional distress means a *significant mental suffering or distress* that may, but does not necessarily, require medical or other professional treatment or counseling.

Harassment means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. *Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.*

Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Unconsented contact means any contact with another individual that is initiated or continued without the contacted individual's consent, or in disregard of that individual's expressed desire that the contact is avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(1) Following or *appearing within sight of that individual;*

(2) Approaching or confronting that individual in a *public place* or on private property;

(3) Appearing at the workplace or residence of that individual;

(4) Entering onto or remaining on property owned, leased or occupied by that individual;

(5) Contacting the individual by telephone;

(6) Sending mail or electronic communications to that individual;

(7) Placing an object on or delivering an object to property owned, leased or occupied by that individual.

Victim means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(b) Any person who engages in stalking is guilty of a misdemeanor, and upon conviction is subject to punishment as prescribed in section 1-11 of this Code.

(c) In a prosecution for a violation of this section evidence that the defendant continued to engage in a course of conduct involving repeated, unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact and to refrain from any further unconsented contact with the victim shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

(d) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other

> criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.
>
> (e) Except as otherwise stated, any person found guilty of any of the foregoing offenses shall be deemed guilty of the commission of a misdemeanor and punished as prescribed in section 1-11 of this Code. (Ord. No. 1611, § 7, 6-21-93).

It is well-settled that an individual may challenge a statute, on its face, if it infringes on rights protected by the First Amendment. *Chicago v. Morales*, 527 U.S. 41, 52 (1999) (Stevens, J., plurality); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973); *Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999). Such an attack will be successful upon a showing that the challenged statute trenches upon a substantial amount of First Amendment protected conduct relative to the statute's plainly legitimate sweep. *Id.* As a result, in the instant case, this Court must conduct a facial analysis to determine whether the Redford Township Stalking Statute violates the First Amendment.

The due process clause of the Fourteenth Amendment prohibits Statutes or Ordinances that are void for vagueness. *People v. Smith*, 75 Mich. App. 64, 254 N.W.2d 654 (1977). A basic principle of due process is that a criminal statute or ordinance is void for vagueness if its prohibitions cannot be clearly defined, if it does not provide for notice of the conduct prescribed, if it confers on a trier of fact unlimited or unfettered discretion to determine whether or not an offense has been committed, or if its coverage is overly broad and impinges on First

Amendment freedoms. *People v. Gagnon*, 129 Mich. App. 678, 341 N.W.2d 867 (1983); *People v. Wilson*, 139 Mich. App. 205, 362 N.W.2d 798 (1984).

A criminal statute or ordinance will fall if it fails to give a person of ordinary intelligence reasonable notice that his behavior may be unlawful. *People v. Ford*, 417 Mich. 66, 331 N.W.2d 878 (1982). Petitioner's arguments warrant a facial analysis because: (1) the statute at issue contains no substantial *mens rea* requirement; *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (explaining that absence of an intent requirement is an important factor to be considered when determining whether a statute is unconstitutionally vague); (2) the statute carries with it substantial criminal penalties including imprisonment; and (3) the more recent decisions of the Supreme Court indicate that facial challenges on due process grounds are appropriate. *Staley v. Kurt Jones*, 239 F.3d 769, 781 (6th Cir. 2001) (First Amendment overbreadth challenges are reviewable on habeas petition).

It is well-settled that a federal court should analyze a state statute that is challenged on vagueness grounds as it has been interpreted by the state's highest court. *Kolender v. Lawson*, 461 U.S. 352, 355-56 n.4 (1983) ("for the purpose of determining whether a state statute is too vague or indefinite to constitute valid legislation we must take the statute as read precisely as the highest court of the State has interpreted it."). Because the Michigan Supreme Court has not yet interpreted the meaning of Michigan's Aggravated Stalking Statute, which mirrors the Redford Township statute, this Court must analyze the statute in light of the Michigan Court of Appeals decision in *People v. White*, 536 N.W.2d 876 (Mich. Ct. App. 1995).

In *People v. White*, the Michigan Court of Appeals noted that " 'harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose,' and such protected activity or conduct has been defined as labor picketing or other organized protests." *White*, 536 N.W.2d at 883 (citing *Pallas v. Florida*, 636 So. 2d 1358, 1360 (Fla. Ct. App. 1994). On habeas review in the Western District of Michigan, the *Staley* court held that the *White* court's reference to labor picketing or other organized protests was a deliberate statement by the state court that only those activities are exempted from the definition of harassment. *Staley v. Jones*, 108 F. Supp. 2d 777, 784, n.16. (W.D. Mich. 2000). On appeal, the Sixth Circuit disagreed with the district court interpretation stating, "there is no indication that the White court's reference to labor picketing and other organized protests were the only activities excluded by the limiting language." *Staley*, 239 F.3d at 781. The Sixth Circuit found the language in White "illustrative not exhaustive, because, in its overbreadth analysis, it concluded that 'the statute could not be applied to entirely innocent conduct.' " *Staley*, 239 F.3d at 782, citing *White*, 536 N.W.2d at 883. Similarly, the Sixth Circuit looked to the Michigan Court of Appeals language in *People v. Kieronski*, 214 Mich. App. 222, 542 N.W.2d 339 (Mich. Ct. App. 1995), where that court held that the defendant's conduct was not exempted under the harassment definition because, although he may have had legitimate business at the public places at which he threatened his victim, the court could discern no legitimate purpose in approaching or confronting the victim in those places. *Staley*, 239 F.3d at 783.

In the present case, Petitioner submits his facts are distinguished from those exhaustively considered by the Sixth Circuit in *Staley v. Jones*. Citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), the *Staley* court acknowledged that "[t]he standing exception for First Amendment challenges is based on the recognition that 'the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.' " *Staley*, 239 F.3d at 784. However, in analyzing overbreadth challenges, the *Broadrick* court concluded, "[t]o put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615-16. Thus, on Staley's overbreadth challenge, the Sixth Circuit found that because the stalking statute addresses a willful pattern of conduct, "any effect on protected speech is marginal when weighed against the plainly legitimate sweep of the statute, and certainly does not warrant facial invalidation of the statute." *Staley*, 239 F.3d at 787.

In this instance, Petitioner's First Amendment freedom of religion, the practice and exercise thereof, constitutes speech and conduct, all constitutionally guaranteed. Although the Sixth Circuit in *Staley v. Jones, supra,* assessed the overbreadth challenge by weighing speech versus conduct in light of *Broadrick, supra,* the *Staley* court did not foreclose conduct-related overbreadth challenges:

"[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Staley*, 239 F.3d at 788, citing *Broadrick*, 413 U.S. at 615-616.

Petitioner has a First Amendment freedom in his legitimate practice of religion at his church, and those functions so sponsored. There is a legitimate purpose for one church member to congratulate another on her confirmation, and even to send a card with a religious message in that context. The Redford Township Stalking Ordinance is void for vagueness and unconstitutionally overbroad because it does not provide for notice that this behavior is unlawful. Specifically, while the statute precludes from the definition of harassment constitutionally protected activity or conduct that serves a legitimate purpose, all post-enactment conduct occurring in the context of church functions remained open to criminal scrutiny. Certainly, a church member cannot be legally on notice that attending church-sponsored functions, in the spirit of those functions, could result in criminal charges. Petitioner contends that the ordinance is overbroad and prohibits constitutionally protected behavior, contrary to the First Amendment.

Petitioner submits that many of the prohibitions contained within the Redford Township Stalking Ordinance impinge upon constitutionally protected or legitimate acts, and, additionally, do not specifically define what type of conduct is legal or illegal. In this instance, Petitioner appeared within sight of complainant, but only during functions hosted by his and complainant's church, St. Robert's. Further, other than the absolutely legitimate intent of practicing his religion and participating in

church-sponsored events, there was no evidence of any other illegitimate or criminal intent on the part of Petitioner.

It is not clear here where the stalking ordinance prohibitions would apply to the Petitioner's conduct. In fact, all of the conduct[3] that the Michigan Court of Appeals relied on to uphold Mr. Bak's conviction clearly fell within the protection of the First Amendment. As such, the Petitioner would contend that the Redford Township ordinance is unconstitutionally overbroad and void for vagueness as applied to him.

III.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL, WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED ESTABLISHING THE ELEMENTS OF THE CRIME OF STALKING.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996)

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[3] The conduct the Michigan Court of Appeals relied on was: (1) in September 1993, defendant approached the victim at a church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994, defendant stared at the victim during several church services; (3) in March 1994, defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, defendant mailed the victim two unsigned cards; (5) in September 1994, defendant drove slowly by her house; and (6) in September 1994, defendant approached her and tried to speak to her at a church fair, despite her repeated refusals on that occasion to speak with him (Appendix A, App. 4-5).

("AEDPA") governs federal habeas review of the state court judgment. Under the AEDPA, a writ will issue when the state court adjudication resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." The Supreme Court has also explained that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 120 S. Ct. 1495 (2000) (O'Connor, J., concurring).

This case involves an unconstitutional lack of evidence in the trial proofs, such that the prosecution failed to present evidence establishing beyond a reasonable doubt that Petitioner was guilty of the crime of stalking. The trial court erred in refusing to grant a Motion for Directed Verdict of Acquittal in the Petitioner's favor at the close of the prosecution's proofs.

Where an appellate court finds that the evidence presented at the trial was insufficient to sustain a jury's verdict of guilty, the remedy for the reviewing court is to enter a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1977).

An essential element of the Due Process Clause of the 14th Amendment is that no person shall be convicted of a criminal offense unless there is sufficient proof, defined as the evidence necessary to convince a trier of fact

beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 566 (1979), *People v. Hampton*, 407 Mich. 354, 285 N.W.2d 284 (1979), *cert. denied*, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 110 (1980). Evidence is insufficient to sustain a conviction if it would not support a finding of guilty beyond a reasonable doubt. *People v. Matthews*, 53 Mich. App. 232, 218 N.W.2d 838 (1974).

The test for a Motion for a Directed Verdict of Acquittal is not whether there is any evidence to support the prosecution's position regarding each element of the offense; rather, the question is whether viewed in a light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find that the essential elements of the crime had been proven beyond a reasonable doubt. *People v. Herbert*, 444 Mich. 466, 511 N.W.2d 654 (1993). If sufficient evidence is not presented, a Directed Verdict of Judgment of Acquittal should be entered. *People v. Potter*, 115 Mich. App. 116, 320 N.W.2d 313 (1982); *People v. Hampton, supra.*

In the present case, the evidence presented at the trial was insufficient to convict the Petitioner of the offense of stalking. Stalking is a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Recently, in *People v. Kieronski*, 214 Mich. App. 222, 229-230 (1995), the Michigan Court of Appeals reinstated

an aggravated stalking case after the trial court had granted the Defendant's Motion to Quash the Information. In doing so, the Court of Appeals noted that there was ample evidence of stalking where the Defendant had told the victim several times that "he would get her" or "I'll get you bitch" and had threatened her parents. *People v. Kieronski, supra* at 232-233.

Similarly, in *People v. White*, 212 Mich. App. 298, 536 N.W.2d 876 (1995), a case involving the constitutionality of the Michigan stalking statute, the Defendant had been convicted of aggravated stalking where there was evidence that he had phoned the victim, sometimes fifty to sixty times a day, and did make verbal threats on at least ten occasions to kill her and her family. *People v. White, supra,* at 883.

By contrast, in the present case there was no credible evidence presented to prove a single essential element of stalking beyond a reasonable doubt. The evidence presented showed that the Petitioner had only five to six contacts with the complainant over a four year period. The contacts alleged to support Defendant's willful "course of conduct" included:

September, 1993 –	Defendant gave complainant some stuffed animals at the church fair;
March, 1994 –	Defendant said congratulations or hello to complainant at the church confirmation reception;
March, 1994 –	Defendant sent complainant a birthday card;

June, 1994 –	Defendant sent complainant a confirmation card;
September, 1994 –	Defendant asked to talk to complainant at the church fair.

The trial evidence indicated that the Petitioner gave stuffed animals to the complainant at a 1993 fair sponsored by his church, but only after complainant's mother consented to Defendant's contact with complainant – specifically, the gift of stuffed animals. The complainant acknowledged that the Petitioner never touched or assaulted her, never made any threats to harm her, never made any sexually suggestive remarks, and never followed her once she indicated the desire to end the contacts. The complaining witness also acknowledged that prior to the last incident at the 1994 fair, she had never told the Petitioner that she did not want to have any contact with him.

The conduct complained of here was not of the type to cause a reasonable person to feel terrorized, frightened, intimidated, harassed or molested. *People v. Kieronski, supra.* **There was no showing of emotional distress. In fact, complainant testified that Defendant never did anything to cause her to be scared.** Unlike the defendants in the *White* or *Kieronski* cases, the Petitioner here did not make any threats to kill or injure either the complainant or her family, **nor was there constant repetitive contact between the Petitioner and the complainant such to justify establishment of a "course of conduct".** As such, the evidence was insufficient to convict.

Further, there was **an insufficient showing of unconsented contacts**. Unconsented contact, as defined by statute, means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's express desire that the contact be avoided or discontinued.

Complainant testified at trial that she never told Petitioner she was not supposed to talk to him or was scared of him. Although Petitioner was told by complainant's father in 1990 not to have contact with complainant, **complainant's mother permitted Petitioner to give complainant the stuffed animals at the church fair in 1993**. Thus, complainant waived notice to Petitioner that his contacts would be construed as unconsented contacts.

The definition of waiver is:

> WAIVER. The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contact, with full knowledge of the material facts, does or forbears to do something the doing of which is inconsistent with the right, or his intention to rely upon it. The renunciation, repudiation, abandonment, or surrender of some claim, right, privilege, or of the opportunity to take advantage of some defect, irregularity or wrong. A doctrine resting upon an equitable principle, which courts of law will recognize. *Atlas Life Insurance Co. v. Schrimsher*, 197 Okl. 643, 66 P.2d 944, 948.

> IMPLIED WAIVER. A wavier is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a wavier, and has incurred trouble or expense thereby. To make out a case of implied "waiver" of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amounting to an estoppel on his part *Rosenthal v. New York Life Insurance Company*, C.C.A. Mo., 99 F.2d 578, 579.

Black's Law Dictionary 1417 (5th ed., 1979)

By definition, complainant waived any notice to Petitioner that his actions would be considered unconsented contacts when her mother gave him permission to give her daughter the stuffed animals at the 1993 church fair.

In this case, the prosecution failed to prove the essential elements of stalking: "unconsented contact", "course of conduct" or "harassment/emotional distress." Where there was insufficient evidence to convict Petitioner of stalking, this Court should reverse the conviction and enter a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1977); *People v. Hampton*, 407 Mich. 354, 285 N.W.2d 284 (1979), *cert. denied*, 449 U.S. 885, 101 S. Ct. 239, 66 L. Ed. 2d 110 (1980);

People v. Potter, 115 Mich. App. 116, 320 N.W.2d 313 (1982).

CONCLUSION

For all of the reasons stated and authority cited herein, the within Petition for Writ of Certiorari should be granted, and the Court should reverse Petitioner's conviction on his claims.

Respectfully submitted,

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Detroit, Michigan 48226
(313) 964-2255

Dated: September 24, 2001

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF REDFORD TOWNSHIP, Plaintiff-Appellee, v MICHAEL JOHN BAK, Defendant-Appellant.	UNPUBLISHED July 21, 2000 No. 212056 Wayne Circuit Court LC No. 95-529988-AV

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of misdemeanor stalking in violation of the Redford Township anti-stalking ordinance Ch 58, Art III, § 58-60 (hereinafter "the ordinance"). We affirm.

While he was in his late thirties and early forties, defendant contacted the young female victim on several separate occasions. The contacts began when the girl was ten and continued until she was fourteen. Several years after the contacts began, plaintiff enacted the ordinance. When the contacts continued after the ordinance's enactment, defendant was arrested, tried, and convicted for misdemeanor stalking.

Defendant first argues that the trial court violated the Ex Post Facto Clauses of the federal and state constitutions, U.S. Const, art I, § 9, cl 3; Const 1963, art 1, § 10, when it admitted evidence of contacts that occurred

between defendant and the victim before the township stalking ordinance was enacted. We disagree. A law which affects the prosecution or disposition of criminal cases involving crimes committed before the law's effective date violates the constitutional prohibition against ex post facto laws if the law "(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence." *Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).

The ordinance was enacted on June 21, 1993. The following contacts occurred before the ordinance's enactment: (1) defendant's contacts with the victim at basketball games when she was ten years old; (2) defendant's walking or following the victim home from school when she was ten or twelve years old; (3) defendant's requesting permission from the victim's mother to give the victim a stuffed animal; and (4) the victim's father warning that defendant should stay away from his daughter. The remaining contacts, see *infra* at 3, occurred after the ordinance was enacted.

The district court allowed the introduction of testimony regarding those contacts occurring before the ordinance's enactment, ruling that defendant had opened the door to such testimony on cross-examination. The circuit court affirmed, albeit on different grounds.[1] We agree

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[1] The circuit court relied on *United States v Poulos*, 895 F.2d 1113, 1119-1120 (CA 6, 1990), abrogated on other grounds in *Horton v California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990), for the rule that a defendant may be convicted of an offense which begins before the law's enactment, but involves

with the district court that defendant opened the door to testimony about the prior contacts. In any event, we note that the jury was specifically instructed that only those contacts that occurred after the ordinance was enacted should be considered for purposes of the offense charged. "[T]he evidence must convince you beyond a reasonable doubt," the trial court instructed, "that the crime occurred between the dates of September, 1993, and September, 1994, within the Charter Township of Redford." A jury is generally presumed to follow the trial court's instructions, until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). The contrary has not been shown in this case.

Defendant next contends that the township ordinance is unconstitutionally vague and overbroad. We disagree. The ordinance is almost identical to the state stalking statute, M.C.L. § 750.411h; MSA 28.643(8), which we upheld against the same challenges in *People v White*, 212 Mich App 298; 536 NW2d 876 (1995). For the same reasons set forth in *White*, we conclude that the ordinance here is neither unconstitutionally overbroad nor vague. *Id.* at 308-313.

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conduct continuing after the law's enactment. The circuit court held, "Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for continuing this conduct even after the stalking ordinance came into existence." We do not believe that *Poulos*, which involved the possession of two gun silencer kits that were neither registered nor identified by serial numbers, applies, given the circumstances of the case at hand.

Defendant also argues that the prosecution failed to present sufficient evidence at trial to support his conviction. We disagree. "In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt." *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). In order to be convicted of the ordinance at issue, the prosecution is required to prove: (1) that the defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose; (2) that such contacts were initiated without the victim's consent, or in disregard of her expressed desire that such contact be avoided or discontinued; (3) that the unconsented to acts would cause a reasonable person to suffer emotional distress; and (4) that the victim actually suffered emotional distress due to these unconsented to contacts.

The prosecution presented testimony that defendant contacted the victim multiple times, over a long period of time. After the ordinance was enacted, defendant contacted the victim on six separate occasions: (1) in September 1993, defendant approached the victim at a church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994, defendant stared at the victim during several church services; (3) in March 1994, defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, defendant mailed the victim two unsigned cards; (5) in September 1994, defendant drove slowly by her house; and (6) in September 1994, defendant approached her and tried to speak to her at a church fair, despite her repeated refusals on that

occasion to speak to him. We believe on this evidence, a reasonable jury could have found that defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose.

We also believe sufficient evidence was presented to establish the second element of the offense. The township ordinance defines unconsented contact to include "following or appearing within sight of the individual;" "approaching or confronting that individual in a public place or on private property;" or "sending mail . . . to that individual." The evidence produced at trial showed that defendant engaged in each of these types of prohibited contact. Furthermore, the evidence showed that each time defendant attempted to speak to the victim, she either walked away or told him she did not want to speak with him. As for the two unsigned cards sent in March and June 1994, we believe a jury could have reasonably inferred that defendant concealed his identity because he knew that his contacts were unwelcome. Finally, we note that a police officer testified that in June 1994 he warned defendant to stay away from the victim or he would be criminally charged. On this evidence, a jury could have reasonably found that defendant engaged in unconsented contact.

Turning to the two final elements of the offense, we conclude that sufficient evidence was presented to establish both that the unconsented to acts would cause a reasonable person to suffer emotional distress, and that the victim actually suffered emotional distress due to these unconsented to contacts. Given defendant's age and the victim's age, defendant's repeated attempts to contact the victim, and the victim's knowledge that defendant

was not supposed to do so, the jury could reasonably have concluded that a reasonable person in the victim's position would have experienced emotional distress. The evidence also supports a finding that the victim did experience emotional distress. Not only did the victim herself testify that she came to fear defendant's contacts, but the victim's neighbor testified that she was practically hysterical, shaking and trembling after defendant tried to speak with her in September 1994.

Finally, defendant next contends that his trial counsel was ineffective when he failed to include in his motion for directed verdict the argument that the victim's mother consented to defendant's contacts with the victim. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[2] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We first take issue with defendant's assertion that the victim's mother had actually consented to the continuing

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

contacts. The record shows that the mother agreed to allow defendant to give her daughter some stuffed animals in 1990. We do not believe the mother's acquiescence to this specific request meant that the mother had granted defendant carte blanche to approach her daughter whenever he wanted. Furthermore, the victim's father testified that it occurred before he warned defendant to stay away from his daughter. Even if defendant's testimony as to the timing of this conversation were believed (defendant claimed the warning came after the conversation with the victim's mother), it should have been clear to defendant from the victim's responses to his contacts that regardless of how he interpreted the contact with the mother, the victim herself had not consented to any contact with defendant. Accordingly, we conclude that because any such motion would have been meritless, defendant has failed to establish that his counsel's assistance was ineffective. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

STATE OF MICHIGAN

17TH DISTRICT COURT (WAYNE COUNTY)

THE PEOPLE OF THE
CHARTER TOWNSHIP
OF REDFORD

V

MICHAEL JOHN BAK

Defendant.
_____/

District No.
94-54,441 CM
Circuit No.
95-529988-AV

MOTION

BEFORE THE HONORABLE
KAREN S. KHALIL, DISTRICT JUDGE

REDFORD TOWNSHIP, MICHIGAN -
Monday, June 12, 1995

APPEARANCES:

For the People of the
charter Township of Redford:
Mr. Vahan C. Vanerian
33900 Schoolcraft
Livonia, MI 48150

For the Defendant:
Mr. Laurence H. Peppler
66 Market Street
Mt. Clemens, MI 48043-5637

Court Reporter:
Mr. John D. Edwards, CSR/CER 3901
Official Court Reporter

* * *

MR. PEPPLER: Laurence Peppler appearing with and on behalf of the defendant Michael John Bak.

THE COURT: Based on your written briefs, as well as, your arguments, the Court finds that the Ordinance is constitutional. I do not find it to be overly broad or vague. And in applying a reasonable person test to the prescribed conduct, the Court finds the Ordinance clearly defines the prohibitions, provides adequate notice for the prescribed conduct and does not in hinge [sic] on First Amendment freedoms. Given the age and intellectual ability of the defendant, as well as, the victim's young age, the reasonable person test allows for a cause of action pursuant to the Statute.

What is a little bit more controlling to me or of concern to me is the issue relating to the Complaint and the inclusion of certain instances of conduct which occurred prior to the enactment of the State Statute and a local Ordinance. However, based on the arguments, the Court does not find that at this time the cause of action should be dismissed. I think it needs to be more clearly defined. If you want to file a Motion and ask for clarification on the point as to what particular information the prosecution intends on producing for purposes of establishing a course of conduct, and whether or not that will include those incidents which allegedly occurred prior to the enactment of the statute and their local ordinance.

This Court does have this matter set for a jury trial on June the 30th, 1995. So, this Court's denial of the Motion to Dismiss will require that we proceed on that date at 8:30 in the morning.

MR. PEPPLER: I will be filing such a Motion, Your Honor, as Your Honor suggested because I certainly don't know the offense the prosecution plans on producing evidence.

THE COURT: The concern that I have is if I dismiss the complaint at this

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STATE OF MICHIGAN

17TH DISTRICT COURT (WAYNE COUNTY)

THE PEOPLE OF THE
CHARTER TOWNSHIP
OF REDFORD

V

MICHAEL JOHN BAK

Defendant.
----------/

District No.
94-54-411-CM
Circuit No.
95-52-9988AV

JURY TRIAL

BEFORE THE HONORABLE
KAREN S. KHALIL, DISTRICT JUDGE

REDFORD TOWNSHIP, MICHIGAN -
Friday, August 11, 1995

APPEARANCES:

For the People of the
Township of Redford:
Mr. Vahan C. Vanerian
Assistant Prosecuting Attorney
33900 Schoolcraft
Livonia, MI 48150

For the Defendant:
Mr. Laurence H. Peppler
66 Market Street
Mt. Clemens, MI 48043-5637

Court Reporter:
Mr. John D. Edwards, CSR/CER 3901
Official Court Reporter

* * *

McHenry ever gave any kind of notice to my client. There's nothing in any police report I ever received. This is the first time I ever heard this evidence.

THE COURT: All right. The Court will grant in-part the Motion in Limine. The Court will not allow testimony relating to other children that would have been in contact or would have come in contact with the defendant in this case. In addition, the Court will exclude evidence of prior contact by the defendant with the victim, prior contact meaning contact prior to the date that the statute was enacted. However, it will allow testimony which would lay a foundation for the jury to understand that the victim did know the defendant and had had some contact with him prior to the date that the statute was enacted, but it will not allow the prosecution to delve into the areas which would establish a course of conduct prior to the enactment of the statute.

MR. PEPPLER: And I would like to know, Your Honor, what this proposed testimony is from Mr. McHenry and when this supposed notice was given to my client because this is the first I've heard of it

THE COURT: Okay. I'm not going to take that up right now.

MR. PEPPLER: But I don't want any mention of that made. I would ask that no mention of that be made before this jury.

THE COURT: Well, again, that would come within the purview that the court has already ruled on.

MR. PEPPLER: Thank you.

THE COURT: But if it is to establish that the father of the victim had contact with the defendant, that he knew the defendant, that he had had a conversation, that would be allowed. I'm not going to allow specifics.

MR. PEPPLER: Not the nature of the conversation with the defendant

THE COURT: I'll allow that there was contact between the victim's father and the defendant prior to the enactment of the statute, and that there was some relationship established prior to the enactment of the statute. So, you can go ahead and do that.

MR. VANERIAN: Why – Well, what's the basis for not allowing the father to testify that he told Mr. Bak, stay away from my daughter?

THE COURT: Are you going to use it for purposes of establishing that the warning was given for purposes of fulfilling the requirement of the statute? Is that the warning that you're going to use in order to fulfill the purpose of the statute?

MR. VANERIAN: Well, that's going to be one – that's going to be one of them. But, Your Honor –

THE COURT: Now, wait a minute.

MR. VANERIAN: This is not an act –

THE COURT: Wait a minute.

MR. VANERIAN: – that Mr. Bak is being prosecuted for. This is the act of the father. You know, this is not an act of the part of the defendant which he's being prosecuted for.

THE COURT: You're going to admit testimony or you're going to seek testimony from other witnesses relating to a subsequent warning which was given?

MR. VANERIAN: I'm going to illicit [sic] testimony from the father that he went to Mr. Bak's house and told him to leave his daughter alone. And that occurred prior to the enactment of the statute.

THE COURT: That wouldn't go to the course of conduct.

MR. PEPPLER: I would like to know when this occurred.

THE COURT: Wait a minute. Answer my question.

MR. VANERIAN: He's not being punished for Mr. McHenry's warning. His conduct is the contact with the victim. And that's what's at issue here.

THE COURT: All right. I'll allow that testimony as well.

MR. PEPPLER: Your Honor?

THE COURT: I'm not going to argue it.

MR. PEPPLER: Your Honor, I don't want to argue.

THE COURT: I'm not going to argue it.

MR. PEPPLER: I'd like to make a record.

THE COURT: The Court has ruled.

MR. PEPPLER: I understand, but I'd like to make a record.

THE COURT: Go ahead.

MR. PEPPLER: I'd like to make a record that number one, this is far more prejudicial than probative. What Mr. Vanerian is trying to do is get in the back door which the court just excluded. It's going to put in the jury's mind the fact that there was something that Mr. Bak did that was wrong. Now, that father can't testify – just because he went over and told Mr. Bak not to have any contact with his daughter, I mean, that doesn't mean anything. All right, you know, that doesn't mean that Mr. Bak did anything.

However, it's going to implant in the jury's mind that Mr. Bak had engaged in things and they're going to try to make out elements prior to the enactment of the statute. Now, I'd like to know the date. I think the date is very germaine [sic] to this. If it occurred three years prior to any first – the first act that it could be charged underneath the statute, I don't think it's relevant at all and extremely prejudicial.

MR. VANERIAN: Your Honor, let me just make an illustration here. A woman receives a heart box shape of chocolate from a man. Now, would that cause a reasonable person to feel threatened, harassed or intimidated? You can't tell just by looking at that alone. Most people would probably say, no, it's not. It's probably an act of kindness. And it would be if that man was the woman's husband. But if that's the man who was convicted of raping the woman a year before, then that would very much. Then that act would cause a reasonable person to feel threatened, harassed or intimidated, and it would be admissible for the purpose of proving that particular element. And that's why I think that the contact, that the whole course of history, the picture here, you can't just

take these instances of contact and take them out of context and put them in a vacuum and say, well, would this cause a reasonable person to feel harassed or intimidated? That's – you know, you just can't do it. I mean, you got to look at the whole –

THE COURT: Once you establish a course of conduct, this Court will require that you provide evidence which would meet the requirements under the statute after the date the statute was enacted. Again, the Court will allow you –

MR. VANERIAN: I think –

THE COURT: I'm not going to argue with you, Mr. Vanerian. The Court will allow you to introduce evidence that the victim had contact with the defendant prior to the enactment of the statute. The Court will also allow you to admit evidence that the father had contact with the victim – or with the defendant prior to enactment of the statute, and the Court will allow you to illicit [sic] the testimony which would show that the father gave warning to the defendant prior to the enactment of the statute.

MR. PEPPLER: I would like to know when that occurred, Your Honor.

MR. VANERIAN: That occurred after Mr. Bak followed her home. That would have been in September of 1990.

State of the [sic] Michigan
in the Circuit Court for the State of Michigan

PEOPLE OF THE
TOWNSHIP OF REDFORD,
Plaintiff/Appellee,
v.
MICHAEL JOHN BAK,
Defendant/Appellant.

NO. 95-529988 AV
HON. JOHN A. MURPHY

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ORDER AND OPINION AFFIRMING APPELLANT'S CONVICTION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on March 26, 1996

PRESENT: THE HONORABLE JOHN A. MURPHY

The instant appeal arises from Appellant's conviction under Appellee's stalking ordinance, TOWNSHIP OF REDFORD, CODE OF ORDINANCES ch. 58, art. III, sec. 58-60. The ordinance was enacted in 1993. The ordinance, as Appellee notes, for our purposes here "mirrors" the state stalking statute, MCLA 750.411h. *See* Appellee's Brief at 8-9.

Appellant here was convicted of stalking a child. Apparently he and the child first met when the child was in the fifth grade. Appellant worked at basketball games the child attended.

There were a series of contacts over the next years. Appellant and Appellee take different views of the nature of these contacts. Appellant stresses that they were fortuitous and accordingly informal, and that the complainant did not appear to be frightened by them or by him. Appellee City contests the asserted harmless nature of these meetings. For instance, Appellee argues that in September 1990 Appellant, in meeting the complainant and her friend, grabbed the book bag of the friend and frightened both girls; Appellee argues that this was only one of several instances in which Appellant followed complainant home from school. Another purported instance of physical contact between Appellant and complainant happened at one of the meetings at the basketball games, when, Complainant testified, Appellant "took [her] hands" and "sp[u]n [her] around." Transcript at 76. The complainant also testified that other people were present at the time and that Appellant spun some of them around as well. *Id.* at 77.

Appellant also appears to have initiated other types of contacts with the complainant. On at least two occasions, he sent her cards, once for her graduation and once for her birthday.

At trial itself, testimony focused on two meetings between the complainant and the Appellant. One meeting appears to have occurred in September 1993, at a fair. The complainant was then fourteen years old. Appellant admits that he approached the youth, that the youth was frightened, and that the youth stated that she did not want to talk to the Appellant. Appellant also stresses that he made no attempt to threaten or sexually abuse the child. The Appellant did end up giving the complainant

something – some stuffed animals. *Id.* at 67. At trial, the complainant testified that she did not accept these gifts willingly but took them only because she believed that the Appellant would not leave her alone unless she accepted them. *Id.* at 68. Appellant testified that she was "scared." *Id.*

Testimony at trial also centered on a second meeting, one that took place at complainant's confirmation in March 1994, thus approximately six months after the graduation incident. In the interval, Complainant and Appellant had seen each other occasionally at church. Complainant testified that Appellant made no effort to initiate contact with her during these meetings at church. *Id.* at 82. However, it should be noted that in another part of her testimony Complainant did say that Appellant would sometimes stare at her in Church. *Id.* at 85.

The March 1994 incident happened at a reception for Complainant and others who had just been confirmed. Appellant showed up at the gym where the reception was held. Complainant testified that Appellant approached her, said hello, and that Appellant then walked away. *Id.* at 70.

The immediate cause of Appellant's arrest appears to have been a September 1994 encounter with the complainant. Complainant was talking with a friend by the entrance to her church, in the vestibule, to be precise. Complainant testified that Appellant came over and asked to talk to her. Complainant further testified that she repeatedly told him "no" but that Appellant kept insisting that he needed to talk to her. *Id.* at 86-87. Complainant also testified at trial that when she walked away

from Appellant then she went toward a police officer. *Id.* at 87.

Trial was held on August 11, 1995, before a jury in the 17th District Court. Prior to trial, Defendant-Appellant attempted to dismiss the case against him on the grounds that the ordinance at issue here was unconstitutionally vague and overbroad. This motion was denied. Counsel for defendant also brought a motion to exclude certain evidence from the trial. This evidence pertained to the meetings that had taken place between Appellant and complainant before the enactment of either the ordinance or the statute, that is, before 1993. appellant argued that admitting evidence of such meetings violated the Federal and State Constitutions' Ex Post Facto Clauses. This motion was granted in part; the Court ruled that the only evidence pertaining to contacts before the date of enactment that was admissible was evidence of a contact not between Appellant and Complainant but between Appellant and complainant's father: namely, a telephone call in which complainant's father purportedly told the Appellant to leave his child alone.

However, more evidence than just of the telephone conversation alone ended up being admitted at trial. This happened because the trial judge ruled that Defendant-Appellant's counsel "opened the door" to admission of such testimony when, in cross-examining complainant, he asked her about some pre-1993 contacts himself, including the incident at the game when Appellant purportedly "spun complainant around." On redirect, thus, the prosecutor asked complainant about the incident when, complainant testified, Appellant approached her and her friend on their way home from school and ended up

"pull[ing]" the friend's schoolbag until pencils fell out. *Id.* at 93. This incident occurred before the enactment of the ordinance.

At the end of trial, Appellant moved for a directed verdict of not guilty. This was denied; the jury deliberated and rendered a verdict of guilty. Appellant has filed a timely appeal to contest this verdict.

Appellant raises three issues on appeal: alleged error by the trial court in denying Defendant-Appellant's motion for a directed verdict; unconstitutionality of the stalking ordinance itself on grounds of vagueness and overbreadth; and the argument from the Ex Post Facto Clause discussed above.

We start with the first issue. Appellant argues that the trial court erred in denying his motion for a directed verdict of not guilty. Appellant argues that there was insufficient evidence to establish all of the necessary elements of the crime here, at least beyond a reasonable doubt.

Appellant's argument here appears to boil down to the nature of the contacts between Defendant-Appellant and complainant here.[1] Appellant contends that none of

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[1] Thus, we do not dwell on whether there was sufficient evidence admitted to support the occurrence of each of the alleged contacts between complainant and Appellant discussed. Suffice it to say that as to each of these incidents we have at least the testimony of the complainant herself to support the version given; while Appellant may have presented evidence to contest either the occurrence of the contact itself or its nature, this was an issue of credibility that the jury was better positioned than this Court to decide.

these contacts could remotely be characterized as being hostile or intimidating. Appellant argues that stalking is a crime that involve making threatening contacts with the victim.

The natural place to begin is with the words of the statute/ordinance. The ordinance's definition of stalking is set forth in subsection (1)(d):

> "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> Harassment, in turn, is defined as:
>
> . . . conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

An immediate problem arise: the ordinance talks about the reasonable person and his or her perceptions; the complainant here is a child, and we need to know if the term "reasonable person" allows us to take into account the fact that children may find some things frightening

that an adult would not.[2] Can "reasonable person" translate into "reasonable child"?

We find it difficult to so extend the definition of reasonable person in this instance. Criminal liability is at stake here. While it is true that in the context of torts the judicial inclination is to modify the term *reasonable person* to *reasonable child* when the issue is foreseeability from a child's standpoint, *see* RESTATEMENT (SECOND) OF TORTS sec. 283A, extending this to a criminal context is something we are reluctant to do absent express legislative authorization. We note also that when legislatures have sought to define stalking from the perspective of the child, they have done so explicitly. *See, e.g.*, CAL. PENAL CODE SEC. 11414 (defining intentional harassment of the child as "conduct [that] must be such as would cause a to suffer [sic] reasonable child to suffer substantial emotional distress") (emphasis added). The term employed here is "reasonable person," not "reasonable child," and we must interpret the ordinance accordingly.

It is hard to define "stalking" comprehensively. Part of the problem is that stalking statutes are prophylactic in nature: the idea is to apprehend the stalker and protect his victim before he has a chance to harm the victim. This argues for an intent, or at least a possibility, of holding actors liable even for acts harmless on their surface if such acts betray an intent to maliciously harass someone.

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[2] This is the argument Appellee implicitly attempts when it asks us to view "a course of conduct engaged in by an adult, approximately 36 to 40 years of age, over a period of four years towards [sic] a child, beginning at age 10 and continuing to age 14."

On the other hand, there is a natural reluctance in the law to punish people for acts that in and of themselves are harmless.

Another part of the problem is that the aim in deterring stalking is not only to prevent the actual occurrence of physical harm but to stop the fear that threats themselves create, even absent any physical harm. Stalking laws aim to protect victims against stalkers who may be just bluffing in making their threats. *Cr. R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (noting, in the context of hate crimes, that threats are not protected by the First Amendment partly because of the "disruptoin that fear engenders").

The ordinance at issue appears to necessitate seriously egregious conduct for it to apply to a person's contacts with another. The definition of stalking above includes terms like "harassing" and "threatening" . . . terms that are not to be taken lightly and that would appear to demand conduct that does more than merely annoy.

However, the situation is complicated by the fact that the ordinance allows a presumption as follows:

> In a prosecution of this section evidence that the defendant continued to engage in a course of conduct involving repeated, unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact and to refrain from any further unconsented contact with the victim shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized,

> frightened, intimated, threatened, harassed or molested.

Nonetheless, as written the presumption extends only so far: it does not allow us to satisfy the standard that a reasonable person must feel the conduct to be terrorizing, frightening, and the like.

Was Appellant's conduct here such as to terrorize and threaten the reasonable person?

As to most of the incidents, we would say no. Sending unsolicited and unwanted birthday cards and the like may annoy but it is difficult to see such behavior as threatening.

However, in September 1990 we believe Defendant-Appellant crossed the line from merely annoying to threatening and harassing. This was when he insisted on walking and talking to the girls on the way home from school until the point that he grabbed one of the girl's book bags. Here Defendant clearly initiated physical contact, or at least the threat thereof. Appellant may dispute this version of the events, but there was testimony to it at trial; the jury apparently chose to believe such testimony. Combining this event with the other events we believe that a jury could find a case of stalking here: there is pattern of events that includes events that a reasonable person could feel threatened by.[3]

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[3] What we are doing here then is rejecting the requirement that each and every event, viewed in isolation, be seen as being harassing. The ordinance focuses on a "course of conduct, and speaks of such a course as being a [sic] "a pattern of conduct composed of a series of two or more separate noncontinuous

Moreover, there was evidence at trial that complainant in fact did feel threatened and harassed. Complainant testified to being scared; a neighbor found complainant "hysterical" after the September 1994 incident. Complainant quibbles here: he wants to argue that some of his contacts with complainant did not frighten her. But even if true, this ignores the fact that any reasonable interpretation of stalking does not demand that we look at each and every event at each and every instant to determine fear. Stalking is a pattern of conduct; we look both at each event *and* their sum total to determine if the net result has been to leave the victim fearful. Indeed, it is common for stalkers to begin their stalking with innocent, even pleasing activities that do not frighten the victim until repeated contacts make clear that the stalker refuses to leave the victim alone, and the law of stalking must recognize this.

We now turn to the constitutionality of the ordinance. Defendant-Appellant argues here that the ordinance is

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acts, evidencing a continuity of purpose." We believe that elements of the pattern can and must be interpreted in light of other elements. Thus, there is a difference between someone waving at someone in and by itself and someone waving at someone the day after he has threatened to kill her. The latter wave cannot reasonably be construed as the same innocent act the former probably is.

In the instant case, we have a series of events that admittedly in isolation are not terrorizing. Sending someone a birthday or confirmation card is not equivalent to terrorizing them. But here there was evidence at trial that Appellant maintained the string of acts, however innocent in themselves, after having harassed complainant to the point of physically threatening her in the schoolbag incident.

both vague and overbroad and therefore unconstitutional under both the State and Federal Constitutions.

We do not find the ordinance to be vague. The key here appears to be the "reasonable person" requirement enumerated above. This requirement is enough of an anchor to give a clear idea of the range of conduct liable under the ordinance.

An inquiry into vagueness is two-part: First is the question of whether the ordinance gives notice; that is, whether the ordinance "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352 (1983). Second is the consistency requirement: the provision at issue must be explicit enough that it cannot be applied in an arbitrary or discriminatory manner: we need standards that guide and constrain the enforcer. In practice, many of the arguments concerning the first prong of the test – notice – shade over into arguments concerning the second prong of the test – administrative discretion.

As our discussion above shows, the ordinance here has certain prerequisites to its application. We require conduct that does not merely annoy but that "terrorizes." The word "terrorize" is not a week term – it mandates conduct of a dangerous and egregious nature. Moreover, such "terrorism" cannot exist only in the minds of the self-professed victim: we require conduct that a reasonable person finds threatening and terroristic and emotionally distressing. Note that a twofold requirement of reasonability is imposed here: both the nature of the act and the damage suffered are constrained.

This is not to say that the conduct that is proscribed here is of a bright-line right-or-wrong nature; but this may be because stalking itself is not susceptible to such a definition. As shown above, we were able to apply the ordinance in the instant situation in a clear-cut manner: we held that the act of sending birthday cards could not possibly meet the ordinance here, but the act of following complainant and her friend to the point that possession of their belongings was interfered with can – at least when combined with Appellant's repeated attempts to contact or send complainant things. As we mentioned above. Appellant crossed a clear line here.

Moreover, the definition of stalking involves not just any crossing of the line but a "willful" or intentional one. This is important here because in assessing the vagueness, or lack thereof, of an ordinance or statute courts will focus on the necessary scienter requirement. As the U.S. Supreme Court has put it, to punish acts "knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act . . . is a violation of the law." *Screws v. United States*, 325 U.S. 91, 102 (1945).

We do admit that this "willfulness requirement" is somewhat watered down here in that what is apparently required to be willful by the ordinance (and the statute) is not the actual causing of emotional distress but only the unconsented contact with the individual itself.[4] That is,

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[4] *Compare, e.g.*, CAL. PENAL CODE sec. 646.9 (West 1996) (requiring that stalker "willfully, maliciously, and repeatedly follows or harassed another person" *and* "make a credible threat with the intent to place that person in reasonable fear of death

the ordinance is apparently written so as to include the type of stalking resulting from erotomania, in which the stalker pursues his victim not with any intent to frighten her but only because he is obsessively in love with the victim and wishes to express his romantic admiration and seek its reciprocal in the victim: "Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person. . . . "[5] But as explained *supra*,

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or great bodily injury"). Thus, the Californian stalking statute does not appear to include the actions of the hopelessly lovelorn who pursues his victim not intending to frighten or threaten her but only to express his devotion, however excessive such conduct might be.

[5] In construing "willful" here as not requiring a specific intent to inflict emotional distress, we are adopting what we see to be the more natural reading of the ordinance. The plain words of the ordinance, quoted *supra* in the text, speak of a "willful" course of conduct to contact another but do not extend this willfulness to the actual causing of emotional distress in the victim itself. We note that this interpretation, which allows the language to extend to instances of erotomania free of what is commonly regarded as hostile intent, appears to be consistent with the intent of the Michigan Legislature in enacting MCLA 750.540e, and we have no evidence that the Township of Redford intended anything different in its version. *See, e.g., Anti-Stalking Legislation, 1992: Hearings Before the Sen. Judiciary Comm.*, 102d Cong., 2d Sess. (1992) (statement of Mich. State Rep. Perry Bullard, *cited in* Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 1009 n. 162 (1993).

Mentioning Robert Guy's piece brings up yet another potential complication here in that Guy apparently sees the willfulness requirement of the statute/ordinance, at least as interpreted by us here, as making the statute a "strict liability" statute, *id.* at 1009, and as thus enacting high hurdles indeed to

willfulness, even as confined here to course of conduct alone, does not obviate all considerations of deliberate wrongdoing but rather eschews a specific-intent standard in favor of a more generalized notion of acting with "evil intent." A person who willfully pursues a course of conduct involving repeated contacts with another, even if he himself believes these contacts to be desirable and non-threatening, is still doing *something* deliberately. Thus, a requirement of scienter still exists and still works to save the ordinance from vagueness. Again as the Supreme Court has put it, a statute that penalizes acts "knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack

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its constitutionality since the constitutionality of a strict liability criminal statute is never easy to maintain. *See* Wayne LaFave & Austin Scott, Criminal Law sec. 2.12(d) (1986) (citing cases).

However, this does not appear to be a proper interpretation of the ordinance/statute, at least according to the dictates of Michigan law.

It is true that "willfully," under Michigan law, has been interpreted to mean "something less than specific intent." *People v. Beaudin*, 110 Mich. App. 147, 152 (1981), *rev'd*, 417 Mich. 570 (1983). However, this does not mean that the term entails no sort of intent at all. While it is hard to pin down any one meaning for the term, equivalents to it are constructions like "evil intent," bad purpose," and "guilty knowledge." *See, e.g., People v. Lerma*, 66 Mich. App. 566 (1976). Thus, in employing the construction "willful course of conduct" in the stalking ordinance/statute the authorities did not intend to wash the offense of all taint of deliberate pursuit of "evil": stalking involves an intent to deliberately pursue a course of conduct with the knowledge that the ends in view are not legitimate. This can still cover the erotomaniac, because in pursuing his inamorata, he can do so knowing that he intends no harm but that the acts fall outside the law.

of warning or knowledge that the act . . . is a violation of the law." *Screws*, 325 U.S. at 102. Moreover, the conduct must still be such as to cause a reasonable person to suffer emotional distress: thus the scienter and reasonable person requirements intertwine to bind the discretion of law enforcement officers.

We now turn to overbreadth. The ordinance contains explicit language mandating that its application be confined to constitutionally protected activities: "Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." Such language insulates the ordinance from overbreadth challenges by its plain meaning.[6]

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[6] We admit to a potential complication here. Laurence Tribe has adduced the following argument in discussing the relationship between overbreadth and vagueness:

> This relationship is most sharply focused in a hypothetical statute: *"It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments."* This statute is guaranteed not to be overbroad since, by its terms, it literally forbids nothing that the Constitution protects. The statute is nonetheless patently vague. . . .

Laurence Tribe, American Constitutional Law sec. 12-29, at 1031 (2d ed. 1988). Thus, for Tribe, any progress the clause in question achieves toward resolving the overbreath problem here merely reintroduces the vagueness problem. *But cf.* Richard Fallon, *The Problem with Overbreadth*, 100 Yale L.J. 853, 905 (1991) (arguing that whatever the merits of Tribe's argument substantively, the problem is still really one of overbreadth, not vagueness).

Whatever its correct label, Tribe's argument appears to have been rejected by the Supreme Court. *See, e.g., Arnett v. Kennedy*, 416 U.S. 134, 162 (1974) (rejecting challenge of overbreadth to

Moreover, the ordinance's requirement, delineated in the discussion of vagueness *supra*, that stalking consist only of conduct that would cause a reasonable person to feel "terrorized" or "intimidated" confines the scope of the statute here to prohibiting conduct that lacks constitutional protection. Individuals do have a constitutionally protected right to freedom of movement. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). But when conduct as well as speech is implicated, as it surely is in stalking, "the overbreadth of a statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added). Here the ordinance's requirement that the "terrorizing" nature of the conduct be such as to threaten a "reasonable person," as well as the requirement that the emotional distress engendered be "significant," means that the ordinance does not infringe on activity such as that involved in ordinary romantic pursuits and the like – activity that is constitutionally protected because it poses no threat to the reasonable individual.

Finally, in rejecting Appellant's constitutional challenges to the ordinance, we are upholding the Court of

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statute whose language excluded speech that is constitutionally protected).

Moreover, to the extent that vagueness is again a problem, we may rely on our analysis above in holding the statute/ordinance not to be vague. The clause in question emphasizes that the ordinance does not reach constitutionally protected conduct; the contours of the ordinance's reach are delineated above, where we argued that it reaches willful conduct that only a reasonable person would find threatening.

Appeals decision in *People v. White,* 212 Mich. App. 298 (1995), in which the Court held that the Michigan stalking statute was not void on grounds of either vagueness or overbreadth.

We arrive at Appellant's third and final argument. This is an argument from the Ex Post Facto Clause and involves admission of statements by complainant's father warning Appellant to stay away from the complainant and admission of evidence pertaining to contacts between the complainant and the Appellant prior to the ordinance's enactment. Appellant argues against admission of these statements on the grounds that these statements and acts were made and done before the enactment of the ordinance and therefore represent a backdoor attempt to punish Appellant for acts that were proper, or at least not illegal, when they were done. As Mr. Peppler framed the issue to the trial judge:

> All the elements of the crime have to transpire after an ordinance or after a statute under which a person's being charged. All of the elements. Some of the elements can't have occurred prior to that and some afterwards.

Transcript at 7. For his part, as related above, the trial judge ruled that while evidence of the past acts could not be admitted in general, evidence that the father of the complainant had warned Appellant to stay away from his child – the date of the warning being before the date of enactment – was admissible. *Id.* at 9. As also related above, this ruling went by the wayside when the judge held that Defendant-Appellant's counsel had opened the door to testimony about pre-enactment contacts in cross-examining complainant.

We need not reach the "opening the door" issue itself here, for we go even farther and hold that evidence of acts constituting the pattern of harassment here would have been admissible at trial even absent defense counsel's opening of the door.

Appellant's argument has a surface validity. The Ex Post Facto Clause of the Federal Constitution[7] holds that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, sec. 9, cl. 3. The U.S. Supreme Court has interpreted this Clause to mean that a law may not be passed if it makes something a crime that was not a crime when it was done. Appellant argues here that any acts committed before the enactment of the stalking ordinance that the prosecution used here, including the warning by the complainant's father, constitute precisely such after-the-fact criminalization.

However, the caselaw fails Appellant here. The law holds that while a defendant may not be convicted for a past offense, he may be convicted for an offense that continues after the enactment of the law in question. *See United States v. Poulos*, 895 F.2d 1113, 1120 (6th Cir. 1990). Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for

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[7] Appellant here also brings his argument under the corresponding clause of the State Constitution. However, our analysis of the Federal Clause will suffice for both the federal and state claims here since Appellant cannot look to the State Clause to provide him greater protection than the Federal Clause. *See In re Certified Question (Fun 'N Sun RV, Inc. v. Michigan)*, 447 Mich. 765, 777 n.13 (1994), *cert. denied*, 115 S. Ct. 2000 (1995).

continuing this conduct even after the stalking ordinance came into existence.

Such a construction of the Ex Post Facto Clause makes sense in terms of the values the Clause is designed to protect. The Clause is intended to guard against the imposition of criminal liability without warning or, to put it another way, to safeguard reasonable reliance on the state of the law. These values were not contravened here. Once the ordinance was passed, Appellant faced a choice: whether to continue his course of conduct involving the complainant despite the potential for future acts of contact – perhaps combined with, but not solely based on, past acts – to create liability. Appellant here apparently made the choice to continue contacting the complainant. This was a risk freely assumed, and justice does not demand that Appellant be protected from the consequences of his actions here. Indeed, if justice demands anything it is that stalkers not be shielded merely because they began stalking before the passage of the statute/ordinance at least when they continue the stalking after passage.

Thus, if any mistake was made here, it was one in the Appellant's favor in that the trial judge did not admit as much evidence of the earlier acts as he could have; accordingly, Appellant cannot use this to reverse his conviction.

Accordingly, having found Appellant's appeal to be without merit, we uphold his conviction by the lower court.

IT IS SO ORDERED.

/s/ JUDGE JOHN A. MURPHY
JOHN A. MURPHY
CIRCUIT COURT JUDGE

A TRUE COPY
TEOLA P HUNTER
WAYNE COUNTY CLERK

By /s/ [Illegible]
DEPUTY CLERK

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

PEOPLE OF THE
CHARTER TOWNSHIP
OF REDFORD.
Plaintiff-Appellee,
v.
MICHAEL JOHN BAK,
Defendant-Appellant.
_____/

Case No.: 95-529988 AV
HON. JOHN A. MURPHY

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ORDER DENYING DEFENDANT-APPELLANT BAK'S MOTION FOR RECONSIDERATION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on: April 23, 1996

HON: JOHN A. MURPHY

This matter having come before the Court on Defendant-Appellant Bak's motion for reconsideration.

No palpable error on the part of the Court having been shown, as required by MCR 2.119(F)(3), and

The Court being otherwise fully advised in the premises, IT IS HEREBY ORDERED that Defendant's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

JUDGE JOHN A. MURPHY
JOHN A. MURPHY
CIRCUIT COURT JUDGE

Court of Appeals, State of Michigan

ORDER

People of Redford Township
v Michael John Bak

Docket # 198467

L.C. # 95 529988 AV

Jane E. Markey
Presiding Judge

William B. Murphy
Janet T. Neff

Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion to add an additional issue is GRANTED.

[SEAL] A true copy entered and certified by Ella Williams, Chief Clerk, on

Mar 5, 1997 /s/ Ella Williams
Date Chief Clerk

Order
Entered: May 27, 1998

Michigan Supreme Court
Lansing, Michigan

[Names Omitted In Printing]

108971

PEOPLE OF THE TOWNSHIP OF REDFORD,

Plaintiff-Appellee,

v

MICHAEL JOHN BAK,

Defendant-Appellant.

SC: 108971
COA: 198467
CC: 95-529988 AV
DC: 94-54-441 CM

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.301(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.

C0520

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 27, 1998 /s/ Corbin R. Davis

Court of Appeals, State of Michigan

ORDER

People of Redford Township v Michael John Bak	Mark J. Cavanagh Presiding Judge
Docket No. 212056	Donald E. Holbrook, Jr.
LC No. 95-529988-AV	Michael J. Kelly Judges

The Court orders that the motion for rehearing is DENIED.

The motion to file later answer is DENIED.

/s/ Mark J. Cavanagh

[SEAL] A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

SEP 28 2000 /s/ Carl L. Gromek
Date Chief Clerk

Order
Entered: June 26, 2001

Michigan Supreme Court
Lansing, Michigan

[Names Omitted In Printing]

118150

PEOPLE OF THE
TOWNSHIP OF REDFORD,

Plaintiff-Appellee,

v

MICHAEL JOHN BAK,

Defendant-Appellant.

SC: 118150
COA: 212056
Wayne CC: 95-529988-AV

On order of the Court, the delayed application for leave to appeal from the July 21, 2000 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

J0619
[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 26, 2001 /s/ [Illegible] Z. Meyer
Deputy Clerk

Supreme Court, U.S.
FILED
NOV 13 2001
OFFICE OF THE CLERK

No. 01-517

IN THE

Supreme Court of the United States

MICHAEL JOHN BAK,

Petitioner,

v.

PEOPLE OF THE TOWNSHIP OF REDFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF MICHIGAN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF OTHER CONTACTS BETWEEN THE PETITIONER/ DEFENDANT AND THE VICTIM PRIOR TO 1993 AFTER THE PETITIONER OPENED THE DOOR FOR SUCH EVIDENCE. THE ADMISSION OF SUCH EVIDENCE DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION?

II. WHETHER UPON A DE NOVO REVIEW THE STALKING ORDINANCE AS APPLIED IN THIS CASE IS CONSTITUTIONAL?

III. WHETHER THE TRIAL COURT PROPERLY DENIED PETITIONER/DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL, WHEN THE PROSECUTION PRESENTED EVIDENCE SUCH THAT A RATIONAL TRIER OF FACT COULD FIND THE PETITIONER/DEFENDANT GUILTY BEYOND A REASONABLE DOUBT?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	viii
Counter-Statement of the Case	1
Reasons for Denying the Writ	13
I. The Trial Court Did Not Abuse Its Discretion When It Allowed The Prosecution To Introduce Evidence Of Other Contacts Between The Defendant And The Stalking Victim Prior To The Enactment Of The Ordinance. The Admission Of Such Evidence Was Not A Violation Of The Ex Post Facto Clause Of The United States Constitution.	13
II. The Application Of The Stalking Ordinance In This Case Is Not Void For Vagueness Or Unconstitutionally Overbroad Under The First Amendment.	18

Contents

Page

III. The District Court Properly Denied Defendant's Motion For Directed Verdict Of Acquittal When The Prosecution Presented Sufficient Evidence Such That A Rational Trier Of Fact Could Find The Defendant Guilty Beyond A Reasonable Doubt. 25

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

Cases:

Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) 22, 23, 24, 25

Cleary v. Turning Point, 203 Mich. App. 208, 512 N.W.2d (1994) 13

Detroit v. Qualls, 434 Mich. 340, 454 N.W.2d 374 (1990) 18

Grayned v. Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) 21

Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) 23

Kotmar, Ltd v. Liquor Control Comm, 207 Mich. App. 687, 525 N.W.2d 921 (1994) 22

Michigan State AFL-CIO v. Civil Service Comm (After Remand), 208 Mich. App. 479, 528 N.W.2d 811 (1995) 21

People v. Bahoda, 448 Mich. 261, 531 N.W.2d 659 (1995) 15

People v. Ballantyne, 212 Mich. App. 629, 538 N.W.2d 106(1995) 23

Cited Authorities

Page

People v. Coons, 216 Mich. App. 728, 550 N.W.2d 600 (1996) 23

People v. Duke, 189 Mich. App. 262, 471 N.W.2d 651 (1991) 25, 26

People v. Garcia, 398 Mich. 250, 247 N.W.2d 547 (1976) 25

People v. Herbert, 444 Mich. 466, 511 N.W.2d 654 (1993) 25

People v. Hunter, 201 Mich. App. 671, 506 N.W.2d 611 (1993) 26

People v. Kieronski, 214 Mich. App. 222, 542 N.W.2d 339 (1996) 23, 26

People v. Lardie, 207 Mich. App. 615, 525 N.W.2d 504 (1994), *aff'd*, 452 Mich. 231, 551 N.W.2d 656 (1996) 21

People v. McAlister, 203 Mich. App. 495, 513 N.W.2d 431 (1994) 13, 17

People v. Potts, 181 Mich. App. 311, 448 N.W.2d 820 (1989) 4, 14

People v. Robinson, 11 Mich. App. 162, 160 N.W.2d 744 (1968) 15

Cited Authorities

Page

People v. Sell, 310 Mich. 305, 17 N.W.2d 193 (1945) 18

People v. Snider, 239 Mich. App. 393, 608 N.W.2d 502 (2000) 13

People v. Ullah, 216 Mich. App 669, 550 N.W.2d 568 (1996) 18

People v. Whalen, 65 Mich. App. 687, 238 N.W.2d 376 (1975) 15

People v. Whetstone, 119 Mich. App. 546, 326 N.W.2d 552 (1982) 15

People v. White, 212 Mich. App. 2998, 536 N.W.2d 876 (1995) 19, 21, 22, 23, 24, 26

Staley v. Jones, 239 F.3d 769 (6th Cir. 2001) 20, 24, 27

Thompson v. Merritt, 192 Mich. App. 412, 481 N.W.2d 735 (1991) 19

United States v. Nat'l Dairy Products Corp, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963) 23

West Bloomfield Charter Twp v. Karchon, 209 Mich. App. 43, 530 N.W.2d 99 (1995) 23

Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) 20

Woodward Ave. Corp. v. Wolff, 312 Mich. 352, 210 N.W.2d 217(1945) 18

Cited Authorities

Page

United States Constitution:

First Amendment 18, 19, 20, 22, 24

Other Authorities:

Redford Township Stalking Ordinance, Chapter 58, Article III, § 58-60 ..... 1, 18

M.C.L. 750.411h 1, 18, 19, 22

M.C.L. 750.411i 22

Mich. Const. 1963, Art 1, § 10 ..... 4, 14

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The Court Of Appeals Of The State Of Michigan Dated July 21, 2000 ..... 1a

Appendix B — Stalking Ordinance Of The Township Of Redford, § 58-60 ..... 8a

COUNTER-STATEMENT OF THE CASE

Petitioner, MICHAEL JOHN BAK, (hereinafter referred to as the Defendant), was a criminal defendant in the 17th District Court located in the Charter Township of Redford, Michigan charged with violating the Township's Stalking Ordinance.[1] The Defendant was convicted of stalking by a jury. After his conviction, the Defendant pursued an appeal of his conviction through all of the State appellate courts for the State of Michigan.

The Defendant was a 38 year old man when he first met 10 year old Kelly Ann McHenry, the stalking victim, at a basketball tournament that was held at St. Robert Bellarmine, (hereinafter referred to as St. Robert's), a Catholic Church and school located in the Township. The Defendant, the victim and the victim's family attended the church. The following facts are based on the trial testimony and procedural history in the courts for the State of Michigan.

Kelly first met the Defendant when she attended church basketball games which the Defendant worked at. The Defendant would talk to Kelly, hold her hand and spin her around.

In September, 1990, Kelly and her next door neighbor, Cameron Kompoltwicz were walking home from St. Robert's School. The Defendant saw the girls and began walking and talking to them. At trial, Kelly testified the girls did not want the Defendant walking with them so they began to walk faster.

---

1. The Redford Township Stalking Ordinance, § 58-60 was enacted in June, 1993 and mirrors the State of Michigan's statutory provisions prohibiting stalking set forth in M.C.L. 750.411h. The State statutory provisions have been the subject of the same constitutional attack asserted by the Petitioner herein through the State of Michigan Supreme Court and in the United States Sixth Circuit Court of Appeals. Each case has ultimately found that the State statutory provisions do not violate the United States and/or the Michigan Constitution as will be more full discussed herein.

The Defendant then grabbed Cameron's book bag and told Cameron to slow down. This scared both the girls so that when they arrived home they told their parents about the incident. As a result, Kelly's and Cameron's fathers went to the Defendant's home and told the Defendant to stay away from the girls.[2]

In September, 1993, the Defendant saw Kelly at a St. Robert's festival and approached her trying to give Kelly some stuffed animals the Defendant won at the festival. Kelly told the Defendant she did not want the animals; but, the Defendant persisted, so Kelly took them so the Defendant would leave her alone.

The next time Kelly saw the Defendant occurred in March, 1994. Kelly was confirmed that day at St. Robert's and was attending a reception. The Defendant was there also and approached Kelly. Kelly walked away from the Defendant.

Kelly's birthday is March 18th. In March 1994, Kelly received an unsigned birthday card at her home through the mail. The envelope in which the card came did not have a return address on it. The Defendant admitted to a Redford Township Police Officer, Eric Gilman, who testified at trial, that he sent the card to Kelly.

In June 1994, Kelly received another unsigned card through the mail, again with no return address on the envelope, when Kelly graduated from St. Robert's Parish. Kelly was in the Eighth Grade at the time and was 13 years old. The Defendant admitted to sending this card to Kelly as well. The Defendant was also at the graduation ceremony in June, 1994.

---

2. These facts were testified to on re-direct of the victim by the Prosecution and are the subject of the Petitioner's first argument that the admission of this evidence violated the ex post facto clause of the United States Constitution. A more detailed account of the testimony is set forth herein at Argument I under the "Reasons for Denying the Writ" section of this Brief.

Kelly's parents made a stalking complaint to the Redford Township Police Department in June 1994. Officer Gilman investigated the complaint and spoke to the Defendant, at which time the Defendant admitted to having sent the two unsigned cards. Officer Gilman informed the Defendant he was to have no contact with Kelly whatsoever or he would be prosecuted for stalking.

In September 1994, Kelly attended another St. Robert's festival. While she was there the Defendant approached Kelly and asked if he could speak to her for a minute. Kelly told the Defendant "No". Kelly testified that she told the Defendant 3 to 4 times that she did not want to talk to him. The Defendant asked again stating "Kelly, can I talk to you for just one minute? I'm not going to say anything wrong." Kelly said no again and walked away. She left to find a police officer because she was scared. The Defendant testified he approached Kelly at the festival to find out if she had received the two cards he sent her.

Kelly testified the Defendant scared her because he had "followed her" home, knew he was supposed to stay away from her; and the Defendant sent her two unsigned cards.

Kelly's neighbor was at the festival in September 1994. The neighbor testified he saw Kelly right after the Defendant attempted to talk to her. At that time, Kelly was hysterical and came running up to him. Kelly was crying and trembling.

Contrary to the assertion of the Petitioner in his Statement of the Case, Page 6, Kelly did not recant her testimony as to being scared of the Defendant or as to the contacts she had with the Defendant.

Officer Gilman contacted the Defendant on September 27, 1994, and asked the Defendant to come to the police station to discuss the Defendant's contact with Kelly at the festival. The Defendant went to the police station and was interviewed

by Officer Gilman. During the interview, the Defendant admitted to sending the two unsigned cards to Kelly. The Defendant admitted he had been told in 1990 to stay away from Kelly by Kelly's father. The Defendant also admitted to attempting to speak with Kelly at the festival in September 1994. During the interview, the Defendant wrote out his own statement as to what occurred between him and Kelly during the September 1994 festival. Eventually a charge of stalking was filed against the Defendant and prosecuted in the 17th District Court.

Prior to the jury trial, Defendant filed a Motion to Dismiss asserting the Township stalking ordinance was unconstitutionally void for vagueness and overbroad. The motion was denied by the trial court. The Defendant then filed a Motion in Limine to have the trial court prohibit the prosecution from introducing any evidence of the Defendant's contacts with Kelly prior to the enactment of the Township Ordinance on June 23, 1993. The prior contacts occurred on June 7, 1989, September 25, 1990 and September 28, 1990. The Defendant argued these incidents occurred prior to the enactment of the stalking ordinance and any reference to these incidents at trial would violate the ex post facto law; **citing the Michigan Constitution;** Mich. Const. 1963, Art 1, § 10; and *People v. Potts*, 181 Mich. App. 311; 448 N.W.2d 820 (1989); **not the United States Constitution.** The Defendant also asserted any introduction of the prior incidents would be more prejudicial than probative.

The trial court granted the Defendant's motion in part prohibiting the prosecution from introducing any testimony relating to contacts with other children and the contacts the Defendant had with Kelly prior to the enactment of the stalking ordinance. The Court allowed the prosecution to introduce testimony which would lay a foundation for the jury so the jury would understand that Kelly and the Defendant knew each other before the alleged crime took place. However, the prosecution

was prevented from getting into any of the details regarding those prior contacts and what took place when the contacts occurred. The trial court allowed the prosecution to introduce testimony to the effect that Kelly's father had previously told the Defendant to stay away from Kelly. The trial court told the prosecution it would have to introduce some testimony that the Defendant had been told to stay away from Kelly by someone *after* the enactment of the stalking ordinance in order for the charge to go forward. Then on cross-examination of the victim's father, the Defendant elicited testimony which went into the details of the time that the Defendant followed the victim and her friend home from school, prior to the enactment of the stalking ordinance.

At trial Kelly testified as stated previously. During the Defendant's cross-examination of Kelly, counsel for the Defendant asked Kelly to tell the Court of *each and every time she was contacted by the Defendant*. Kelly aware of the Court's ruling on Defendant's Motion in Limine, testified only to the contacts the Defendant had with her after the enactment of the stalking ordinance; i.e. September 1993, March 1994, June 1994, receiving the two unsigned cards in March and June of 1994; and, the last attempted contact at the festival in September of 1994. Finally, *just before the Defendant's cross-examination was over the Defendant asked Kelly the following:*

> Q. Other than sending you some nice cards and giving you some teddy bears and saying hello once in a while, that's the only contact you've had with Mr. Bak, right?
>
> A. Yes.
>
> **Mr. Peppler**: No further questions, Your Honor.

After that question, the defense had no more questions for Kelly. The prosecution was offered a chance for re-direct. Prior

to engaging in same, the prosecution and defense had a side-bar conference with the trial court after the jury was excused. At that time a portion of Kelly's testimony was played back. After hearing Kelly's cross-examination testimony the prosecution argued it should be allowed to introduce evidence of all of the prior contacts with Kelly by the Defendant prior to 1993. The prosecution argued the Defendant opened the door when he asked Kelly if there had been any other contacts with the Defendant. The prosecution argued that by asking the last question quoted above defense counsel had left the jury with the impression that the only contacts with Kelly were innocent and Kelly's fright of the Defendant was unfounded. The trial court agreed and allowed the prosecution to question Kelly as to the other contacts she had with the Defendant prior to 1993. Kelly testified to the time she was walking home with her neighbor and the Defendant grabbed the neighbor's book bag. Kelly also testified that the Defendant had followed her home from school on one or two prior occasions. The Defendant was then given the opportunity to re-cross Kelly and chose not to.

Prior to presenting his defense, counsel for the Defendant moved for a directed verdict of not guilty arguing the prosecution failed to establish the necessary elements for the crime of stalking. The trial court denied the motion.

During the Defendant's trial testimony, the Defendant admitted he had been told by the police to stay away from Kelly and other children at St. Robert's. Defendant also admitted he had been told in 1990 to stay away from Kelly by Kelly's father. The Defendant testified the cards were sent unsigned due to a mere oversight on his part. He had just forget to sign them before he sent them.

Prior to submitting the case to the jury for its deliberations the trial court gave instructions to the jury which neither the prosecution nor the defense objected to. For purposes of

addressing the arguments of the Petitioner in his Petition for Writ of Certiorari some of the instructions given by the trial court are quoted below:

> **The evidence must convince you beyond a reasonable doubt that the crime occurred between the dates September, 1993 and September, 1994, within the Charter Township of Redford**. (Emphasis added).
>
> The defendant is charged with the offense of stalking. To establish this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant committed two or more willful, separate and noncontinuous acts of unconsented contact with Kelly McHenry.
>
> * * *
>
> Second, that the contact would cause a reasonable individual to suffer emotional distress.
>
> Third, that the contacts cause [sic] Kelly to suffer emotional distress.
>
> Fourth, that the contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed or molested.
>
> Fifth, that the contact caused Kelly McHenry to feel terrorized, frightened, intimidated, threatened, harassed or molested.
>
> As uses in this section, course of conduct means a pattern of conduct composed of a series of two or more separate noncontinuous acts evidencing a continuity of purpose.

Emotional distress means a significant mental suffering or distress that may, but does not necessarily require medical or other professional treatment or counseling.

Harassment means conduct directed toward a victim that included but is not limited to repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or contact that served a legitimate purpose.

Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Unconsented contact means any contact with another individual that is initiated or continued without the contacted individual's consent, or in disregard of that individual's expressed desire that the contact is avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following: (1) Following or appearing within sight of that individual; (2) Approaching or confronting that individual in a public place or on private property; (3) Appearing at the workplace or residence of that individual; (4) Entering onto or remaining on property owned, leased or occupied by that individual; (5) Contacting the individual by telephone; (6) Sending mail or electronic communications to that individual; (7) Placing an object on or delivering an object to property owned, leased or occupied by that individual.

> Victim means an individual who is the target of a willful course of conduct involving repeated or continuing harassment. Any person who engages in stalking is guilty of a misdemeanor.
>
> * * *

After instructing the jury the trial court specifically asked the prosecution and defense counsel if they had any objections to the jury instructions. No objections were made by either party.

On August 11, 1995, the Defendant was convicted under local Township Ordinance for the misdemeanor offense of stalking after the jury deliberated for 1 hour. The Defendant was sentenced to pay fines and costs and was placed on probation for 24 months and ordered not to have any contact with Kelly.

The Defendant appealed as right to the Wayne County Circuit Court raising three issues: (1) The trial court erred in denying the Motion for Directed Verdict when there was insufficient evidence presented to establish the elements of the charge of stalking; (2) the trial court's admission of acts which occurred prior to the enactment of the stalking ordinance violated the ex post facto clause of the United States and Michigan Constitutions; (3) the Township stalking ordinance is unconstitutionally vague and overbroad.

On March 26, 1996, the Honorable John A. Murphy of the Wayne County Circuit Court for the State of Michigan issued an Opinion and Order Affirming the Petitioner's conviction. Petitioner's App. 17-36 Essentially the Circuit Court found there was specific evidence upon which the jury could have convicted the Petitioner.

The Circuit Court found that the Ordinance was not unconstitutionally vague finding that the Ordinance provided the Petitioner with notice of the type of conduct that was

proscribed. (App. 27-31) The conduct was to be judged by a "reasonable person" standard informing the reader of the Ordinance the nature of the acts that could not be done as well notifying a person of the type of damage to be prevented by prohibiting such conduct. (App. 27) The Court found the Ordinance's definition of stalking involved a willful intentional act satisfying the necessary scienter requirements. (App. 28) The Circuit Court noted that the Ordinance was designed to prohibit not only threatening conduct but also the type of stalking resulting from erotomania, in which the stalker pursues his/her victim not with any intent to frighten the victim but only because he/she is obsessively in love with the victim and wishes to express his/her romantic admiration and seek its reciprocal in the victim. The Circuit Court stated:

> A person who willfully pursues a course of conduct involving repeated contacts with another, even if he himself believes these contacts to be desirable and nonthreatening, is still doing *something* deliberately. Thus, a requirement of scienter still exists and still works to save the ordinance from vagueness. Again as the Supreme Court has put it, a statute that penalizes acts "knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act . . . is a violation of the law." *Screws*, 325 U.S. at 102. Moreover, the conduct must still be such as to cause a reasonable person to suffer emotional distress: thus the scienter and reasonable person requirements intertwine to bind the discretion of law enforcement officers. (App. 30-31)

As for the overbreadth challenge, the Circuit Court found the Ordinance explicitly stated it did not apply to constitutionally protected activities or conduct that serves a legitimate purpose.

Again, the Ordinance only prohibited conduct that would cause a "reasonable person" to feel "terrorized" or "intimidated", confining the scope of the Ordinance to prohibiting conduct which is *not* constitutionally protected. (App. 31-32)

The Circuit Court also rejected the argument that the conviction of the Petitioner violated the ex post facto clause of the Constitutions. The Petitioner asserted the trial court improperly allowed the introduction of testimony as to contacts he had with the victim prior to the enactment of the Ordinance. In rejecting this argument the Circuit Court stated:

> We need not reach the "opening of the door" issue itself here, for we go even farther and hold that evidence of acts constituting the pattern of harassment here would have been admissible at trial even absent defense counsel's opening the door.
>
> Appellant's argument has surface validity. The Ex Post Facto Clause of the Federal Constitution hold that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, sec. 9, sl. 3. The U.S. Supreme Court has interpreted this Clause to mean that a law may not be passed if it makes something a crime that was not a crime when it was done. Appellant argues here that any acts committed before the enactment of the stalking ordinance that the prosecution used here, including the warning by the complainant's father constitute precisely such after-the-fact criminalization.
>
> However, the caselaw fails Appellant here. The law holds that while a defendant may not be convicted for a past offense, he may be convicted for an offense that continues after the enactment of the law in question. *See United States v. Poulos*, 895 F.2d 1113,

> 1120 (6th Cir. 1990). Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for continuing this conduct even after the stalking ordinance came into existence. (App. 34-35)

Petitioner filed a Delayed Application for Leave to Appeal with the Michigan Court of Appeals. The Court of Appeals denied the Petitioner leave to appeal. As a result, the Petitioner sought review by the Michigan Supreme Court. Instead of granting leave to appeal to the Petitioner, the Supreme Court entered an Order of remand sending the case back to the Michigan Court of Appeals directing the Court of Appeals to consider the Petitioner's Application for Leave to Appeal.

After full briefing and oral argument on July 21, 2000, the Court of Appeals affirmed the Petitioner's conviction and upheld the constitutionality of the Township's Ordinance. The Petitioner failed to include the Opinion of the Michigan Court of Appeals as an appendix for this Court to review. (Michigan Court of Appeals' Opinion Appendix A hereto pp. 1-7).

The Michigan Court of Appeals rejected the Petitioner's argument that the admission of the contacts the Petitioner had with the victim prior to the enactment of the Ordinance violated the Ex Post Facto Clauses of the federal and state constitutions. The Court of Appeals agreed with the trial court and the position of the prosecution that the defense had opened the door to the evidence through his cross-examination of the victim. The Court of Appeals also noted that the jury was specifically instructed that the Petitioner could only be convicted for the contacts that occurred after the enactment of the Ordinance. All of the Petitioner's other arguments were rejected as well.

Being unsuccessful in the Michigan Court of Appeals the Petitioner filed a Delayed Application for Leave to Appeal with

the Michigan Supreme Court a second time. The Michigan Supreme Court entered an Order denying leave to appeal to the Petitioner on June 1, 2001.

On or about September 24, 2001, the Defendant/Appellant, John Michael Bak, Petitioner herein filed a Petition for Writ of Certiorari with this Honorable Court. Plaintiff/Appellee in the State of Michigan courts, THE PEOPLE OF THE CHARTER TOWNSHIP OF REDFORD, and Respondent herein, files this Response in Opposition asserting review should not be granted in this matter.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF OTHER CONTACTS BETWEEN THE DEFENDANT AND THE STALKING VICTIM PRIOR TO THE ENACTMENT OF THE ORDINANCE. THE ADMISSION OF SUCH EVIDENCE WAS NOT A VIOLATION OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

It is well established that the decision to admit or exclude evidence rests within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. *Cleary v. Turning Point*, 203 Mich. App. 208; 512 N.W.2d (1994); *People v. McAlister*, 203 Mich. App. 495; 513 N.W.2d 431 (1994). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made. *People v. Snider*, 239 Mich. App. 393, 419; 608 N.W.2d 502 (2000).

In this case prior to trial, the Defendant filed a Motion in Limine seeking to preclude the prosecution from introducing evidence of prior contacts involving the Defendant and the victim on June 7, 1989, September 25, 1990 and September 28, 1990. The Defendant argued these incidents should be precluded from being admitted into evidences because the Township stalking ordinance was not enacted until June 21, 1993. Because these alleged incidents occurred prior to June 21, 1993, said incidents would not be a violation of any criminal law. Defendant argued any reference to these incidents at trial would violate the ex post facto clause, citing Mich. Const. 1963, Art. I, Section 10; *People v. Potts*, 181 Mich. App. 311; 448 N.W.2d 820 (1989). The Defendant also argued that the two incidents, June 7, 1989 and June 9, 1989 did not involve the alleged victim but two other unrelated minor children; therefore, such evidence would be more prejudicial than probative. The Defendant was successful in his Motion as described previously.

During the course of trial, the victim, Kelly McHenry, took the stand and was asked on cross-examination by the Defendant to tell the court *each and every time she was contacted by the Defendant*. After Kelly discussed her contacts with the Defendant that took place *after* the enactment of the Ordinance; i.e. in September 1993, March 1994, June 1994, and receiving the two unsigned cards from the Defendant in 1994; the victim testified the next contact occurred six months later in September 1994 at the St. Robert's festival. Just before the Defendant finished his cross-examination of Kelly, Kelly was asked:

> Q. Other than sending you some nice cards and giving you some teddy bears and saying hello once in a while, that's the only contact you've had with Mr. Bak, right?
>
> A. Yes.
>
> **Mr. Peppler**: No further questions, Your Honor.

When the Defendant asked Kelly the questions he did on cross-examination as to the number of contacts the Defendant had with Kelly that caused her to feel stalked, he opened the door for the admission of the pre-1993 contacts with the Defendant. *People v. Whetstone*, 119 Mich. App. 546; 326 N.W.2d 552 (1982); *People v. Whalen*, 65 Mich. App. 687; 238 N.W.2d 376 (1975); *People v. Robinson*, 11 Mich. App. 162; 160 N.W.2d 744 (1968); *People v. Bahoda*, 448 Mich. 261; 531 N.W.2d 659 (1995).

Further, the allowance of said testimony did *not* violate the ex post facto clauses of the United States and/or Michigan Constitutions. The Defendant was not punished for any activity engaged in prior to 1993. The actions of the Defendant prior to 1993 were allowed into evidence on re-direct examination after the Defendant opened the door through his cross-examination. The Defendant's cross-examination attempted to infer that the Defendant's contact was harmless, and should not have caused a reasonable person to feel any emotional distress. Through his questions, the Defendant attempted to convince the jury his contacts with the victim involved a limited number of harmless, non-threatening attempts to be friendly and should not have caused the victim to feel frightened, scarred or harassed.

In accordance with the trial court's pre-trial ruling, on direct examination of Kelly, the prosecution only elicited testimony as to the contacts Kelly had with the Defendant after 1993. However, on cross-examination, the defense attempted to establish those were the only contacts and said contacts would not cause a reasonable person to feel threatened or harassed. Allowing the prosecution to explore the pre-1993 contacts in light of the cross-examination of the victim was not an abuse of discretion. An unprejudiced person considering the facts on which the trial court acted could not say there was no justification for the ruling.

In affirming the Defendant's conviction, the Michigan Court of Appeals stated:

> We agree with the district court that defendant opened the door to testimony about the prior contacts. In any event, the jury was specifically instructed that only those contacts that occurred after the ordinance was enacted should be considered for purposes of the offense charged. "[T]he evidence must convince you beyond a reasonable doubt," the trial court instructed, "that the crime occurred between the dates of September, 1993 and September, 1994, within the Charter Township of Redford." A jury is generally presumed to follow the trial court's instructions, until the contrary is clearly shown. *People v. McAlister*, 203 Mich. App 495, 504; 513 NW2d 431 (1994). The contrary has not been shown in this case. *People v. Bak*, unpublished opinion per curiam of the Court of Appeals , decided July 21, 2000, (Docket # 212056). Appendix A hereto.

In addition, there was ample testimony that the Defendant had contact with the victim *after the enactment of the ordinance* in 1993 and 1994. In June, 1994, Officer Gilman told the Defendant to stay away from the victim. Yet, in September, 1994, the Defendant again had contact with the victim. At that time Kelly had to tell the Defendant two times she did not want to talk to him. Thus, there was ample testimony to establish the Defendant engaged in a course of conduct with the victim after the enactment of the ordinance and after he had been told to stay away from Kelly. Yet the Defendant continued and attempted to have contact with Kelly.

In this case, the Defendant argues the admission into evidence of the contacts between himself and the victim prior

to the enactment of the ordinance violated the ex post facto clause of the United States Constitution because it made it easier for the prosecution to convict the Defendant. Thereafter at pages 12-15 of his Petition, the Defendant speculates that the jury did not follow the jury instructions. Jury instructions that specifically stated the Defendant had to be guilty beyond a reasonable doubt of violating the ordinance between September 1993 and September 1994. Defendant argues it is "probable that the jury utilized a contact that occurred prior to June 1993, . . . in order to meet the 'course of conduct' element." This is pure speculation on the part of the Defendant. The Court of Appeals specifically rejected this argument when it stated "that a jury is generally presumed to follow the trial court's instructions, until the contrary is shown; citing *People v. McAlister*, 203 Mich. 495, 504; 513 N.W.2d 432 (1994), finding the Defendant did not show the contrary.

The Defendant fails to remember the undisputed facts. The prosecution presented evidence to establish the Defendant contacted Kelly on six separate occasions *after* the enactment of the Ordinance. Those contacts were: (1) in September 1993, the Defendant approached the victim at the church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994 the Defendant stared at the victim during several church services; (3) in March 1994, the Defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, the Defendant mailed the victim two unsigned cards; (5) in September 1994, the Defendant drove slowly by the victim's house; and (6) in September 1994, the Defendant approached the victim and tried to speak to her at the church fair, despite her repeated refusals on that occasion. From this evidence alone a reasonable jury could have found the Defendant willfully engaged in two or more separate noncontinuous acts, evidencing a continuity of purpose. These facts alone were sufficient to convict the Defendant beyond a reasonable doubt.

Allowing the prosecution to introduce evidence of pre-1993 contacts between the victim and the Defendant did not allow the prosecution to convict the Defendant on less evidence.

If the Defendant had a problem with the prosecution's closing argument and/or jury instructions, he should have objected and/or requested a curative instruction. The Defendant failed to do so. Absent an objection or a request for a curative instruction the Defendant cannot raise those issues now on appeal. *People v. Ullah*, 216 Mich. App 669, 679; 550 N.W.2d 568 (1996).

The state court adjudication in this matter did not result in a decision that is contrary to, or involved an unreasonable application of, clearly established Federal law. The Petition for Writ of Certiorari should be denied.

II.

THE APPLICATION OF THE STALKING ORDINANCE IN THIS CASE IS NOT VOID FOR VAGUENESS OR UNCONSTITUTIONALLY OVERBROAD UNDER THE FIRST AMENDMENT.

The Charter Township of Redford, Code of Ordinances, Chapter 58, Article III, § 58-60 prohibits "stalking" and sets forth certain fines and penalties. Appendix B hereto. Said Ordinance mirrors the State statutory provisions prohibiting stalking set forth in M.C.L. 750.411h. A copy of the Ordinance can be found at Appendix B herein.

Ordinances are presumed to be constitutional. *Detroit v. Qualls*, 434 Mich. 340, 364; 454 N.W.2d 374 (1990). The person challenging the constitutionality of an ordinance has the burden of rebutting that presumption. *Woodward Ave. Corp. v. Wolff*, 312 Mich. 352; 210 N.W.2d 217(1945); *People v. Sell*, 310 Mich. 305; 17 N.W.2d 193 (1945). Further, a court is obligated to

construe a statute or ordinance as being constitutional unless its unconstitutionality is clearly apparent. *Thompson v. Merritt,* 192 Mich. App. 412, 424; 481 N.W.2d 735 (1991).

In *People v. White*, 212 Mich. App. 2998; 536 N.W.2d 876 (1995), the Michigan Court of Appeals had to decide whether the State statutory provisions prohibiting stalking was constitutional in the face of vagueness and overbreadth challenges. In *White*, the defendant was charged with violating a local ordinance for the Township of Grand Blanc. In footnote 2 of the opinion the Michigan Court of Appeals acknowledged the local ordinance was identical to M.C.L. 750.411h. *White* at 304.

In his appeal, the defendant in *White* argued, among other things, that the stalking statute was unconstitutionally vague and abridged the defendant's First Amendment right to free speech by permitting a complainant to determine subjectively which telephone calls are acceptable and which are criminal under the stalking statute. Secondly, the defendant argued the stalking law did not provide adequate and fair notice of the prescribed conduct so as to afford him due process. Finally, the defendant asserted the statute was vague because it allowed the trier of fact unstructured and unlimited discretion to determine whether the contacts were criminal or not.

These same arguments are being asserted by the Defendant/ Petitioner herein. (Petition for Writ of Certiorari, p. 19). However, in this case the Petitioner has raised for the first time that this Court should conduct a facial analysis for the additional reason that the statute/Ordinance "contains no substantial *mens rea* requirement. This argument ignores the fact that on appeal after the Wayne County Circuit Court noted the correct legal standard for analyzing a void for vagueness challenge the Court specifically stated the necessary scienter requirement was contained in the Ordinance stating:

> Moreover, the definition of stalking involves not just any crossing of the line but a "willful" or intentional one. This is important here because in assessing the vagueness, or lack thereof, of an ordinance or statute courts will focus on the necessary scienter requirement. As the U.S. Supreme Court has put it, to punish acts "knowingly done with the purpose of doing that which the statute prohibits, the accuses cannot be said to suffer from lack of warning or knowledge that the act . . . is a violation of the law." *Screws v. United States*, 325 U.S. 91, 102 (1945). App. 28.

The Petitioner also asserts "and the more recent decisions of the Supreme Court indicate the facial challenges on due process grounds are appropriate." Yet, there is no case law from this Court cited by the Defendant/Petitioner.

In *Staley v. Jones*, 239 F.3d 769 (6th Cir. 2001), the Sixth Circuit Court of Appeals reversed a finding of the United States District Court for the Western District of Michigan that held the Michigan aggravated stalking statute was unconstitutionally overbroad in violation of the First Amendment. The reversal was based on a finding by the United States Sixth Circuit Court of Appeals that the state court's determination that the Michigan stalking statute was not vague or overbroad was not contrary to, or an unreasonable application of, federal law. Citing this Court's decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1523; 146 L. Ed. 2d 389 (2000); and stating:

> The Court held that a decision of a state court is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently that this Court has on a set of materially indistinguishable facts."

> *Id.* 120 S. Ct. at 1523. The Court also held that an "unreasonable application" occurs when "the state court identifies the correct legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A state adjudication is not "unreasonable" simply because [the federal] court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *Id.* at 1522. n6

After a de novo review of the defendant's constitutional arguments in *White,* the Court recognized the statute/ordinance is afforded a strong presumption of validity, and the Court had a duty to construe it as such, absent a clear showing of unconstitutionality; citing *People v. Lardie,* 207 Mich. App. 615, 617; 525 N.W.2d 504 (1994); *aff'd,* 452 Mich. 231; 551 N.W.2d 656 (1996); *White,* at 309. Further, the Court recognized that a basic tenet of due process prohibits the enactment of a statute which does not clearly define its prohibitions. *Michigan State AFL-CIO v. Civil Service Comm (After Remand),* 208 Mich. App. 479, 492; 528 N.W.2d 811 (1995), citing *Grayned v. Rockford,* 408 U.S. 104, 108; 92 S. Ct. 2294; 33 L. Ed. 2d 222 (1972).

In *White,* the Court recognized three standards for evaluating constitutional vagueness challenges to statutes which are:

> A statute may be challenged for vagueness on grounds that it
>
> - is overbroad, impinging on First Amendment freedoms, or
> - does not provide fair notice of the conduct prescribed, or

- is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. (Citations omitted). *White,* at 309.

Keeping these principles in mind, in *White*, the Court held that neither M.C.L. 750.411h; nor M.C.L. 750.411i; were overbroad or impinged upon the defendant's First Amendment rights under the United States and/or Michigan Constitutions. Reaching that conclusion the Court cited *Kotmar, Ltd v. Liquor Control Comm*, 207 Mich. App. 687, 696; 525 N.W.2d 921 (1994); and *Broadrick v. Oklahoma*, 413 U.S. 601, 613-615; 93 S. Ct. 2908; 37 L. Ed. 2d 830 (1973).

In *Broadrick*, this Court held overbreadth challenges to a statute will *not* succeed when a person to whom a statute may be applied constitutionally has challenged the statute on the ground that it could conceivably be applied in an unconstitutional fashion to other situations. In reaching that conclusion this Court stated:

> [T]he plain import of our cases is, at the very least, *that factual overbreadth adjudication is an exception to our traditional rules of practice* and that *its function is*, a *limited one* at the outset, attenuates as the otherwise unprotected behavior that is forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful constitutionally unprotected conduct. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real but substantial as well, judged in relation to the statute's legitimate sweep. . . . *Broadrick*, at 615.

White, recognized the holding in *Broadrick*. *White* also recognized that the stalking statute/ordinances address a willful pattern of conduct that is combined with speech, that would cause a reasonable person to feel terrorized, threatened, or harassed, causing a reasonable person to suffer emotional distress. The statute/ordinance requires the conduct to be initiated or continued without the victim's consent, or in disregard of the victim's desire to discontinue the conduct. Both the State statute and the Ordinance at issue here specifically state that "harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. (Appendix B)

White, supra, found the stalking statute provided fair notice of the prescribed conduct because it specifically prohibited defendant's unconsented contact with his victim that was aimed at threatening, intimidating, harassing, or frightening the victim regardless of his alleged reasons for his conduct. *White* has been followed on numerous occasions. *See People v. Coons*, 216 Mich. App. 728; 550 N.W.2d 600 (1996); *People v. Ballantyne*, 212 Mich. App. 629; 538 N.W.2d 106(1995); *People v. Kieronski*, 214 Mich. App. 222; 542 N.W.2d 339 (1996).

The void for vagueness doctrine requires a penal statute to define the criminal offense with sufficient definiteness that an ordinary person could understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357; 103 S. Ct. 1855; 75 L. Ed. 2d 903 (1983). In determining the sufficiency of the notice, the statute must be examined in light of the conduct with which the defendant is charged. *United States v. Nat'l Dairy Products Corp*, 372 U.S. 29, 33; 83 S. Ct. 594; 9 L. Ed. 2d 561 (1963). *West Bloomfield Charter Twp v. Karchon*, 209 Mich. App. 43, 48-49; 530 N.W.2d 99 (1995).

In *Staley, supra*; the Sixth Circuit held the it could not be said that the *White* court's application of *Broadrick* was unreasonable. As the Michigan Court of Appeals recognized, the thrust of the statute is proscribing unprotected conduct. Furthermore, any effect on protected speech is marginal when weighed against the plainly legitimate sweep of the statute, and certainly does not warrant facial invalidation of the statute. In fact the Sixth Circuit Court of Appeals noted that a comparison with cases decided by this Court in which the Court struck down laws on overbreadth grounds makes this clear.

Applying the law to the facts of this case, the District Court stated a reasonable person was provided adequate notice of the prohibited conduct in the Township Ordinance. Further, the Ordinance does not impinge upon the First Amendment freedoms of the Defendant, given the age and intellectual ability of the Defendant, as well as the victim's age and the facts presented in the Briefs submitted by the parties prior to the hearing on the Motion in Limine.

Given the fact that the Defendant admitted to being told to stay away from the victim by the victim's father in 1990; and the alleged acts set forth in the charges against the Defendant, for his conduct in 1993 and 1994, it is clear a reasonable person would know the statute prohibited the conduct of the Defendant.

The Circuit Court also rejected Defendant's constitutional challenges finding a reasonable person had fair notice of the type of conduct prohibited. (App. 30-31)

A person will not succeed in challenging a statute on overbreadth grounds if the statute can be constitutionally applied to that person under the facts presented. This Court has recognized, that with respect to overbreadth challenges, a person to whom a statute may be applied constitutionally may not challenge that statute on the ground that it conceivably may be

unconstitutional when applied to others in situations not presented to the court. *Broadrick, supra.* Since the Petitioner's conduct clearly fell within the conduct proscribed by the Ordinance this Court should deny the Petition.

III.

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL WHEN THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE SUCH THAT A RATIONAL TRIER OF FACT COULD FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

On appeal the denial of a motion for directed verdict of acquittal requires the Court to review the evidence in the light most favorable to the prosecution and decide if there is any evidence upon which the trier of fact could predicate a finding of guilt of the crime charged. *People v. Garcia*, 398 Mich. 250; 247 N.W.2d 547 (1976).

On appeal, Defendant contends the District Court erred in denying his Motion for a Directed Verdict of Acquittal claiming the prosecution presented insufficient evidence to establish the elements of the crime of stalking. Respondent reasserts and incorporates herein by reference the Counter-Statement of Facts and the arguments contained at Argument I and II in support of the argument herein.

Reviewing the Township Ordinance it is clear the prosecution presented sufficient evidence upon which a rational trier of fact could find the essential elements of the crime of stalking had been proved beyond a reasonable doubt. *People v. Herbert*, 444 Mich. 466; 511 N.W.2d 654 (1993). Viewing the evidence in the light most favorable to the prosecution the Township met its burden in this case. *People v. Duke*, 189 Mich.

App. 262; 471 N.W.2d 651 (1991); *People v. Hunter*, 201 Mich. App. 671; 506 N.W.2d 611 (1993).

Defendant's reliance on *People v. Kieronski, supra;* and *People v. White, supra*; is without merit. First, both of those cases involved completely different facts from the instant matter and involved aggravated stalking. The Counter-Statement of Facts and Arguments I and II herein establish all of the essential elements were proved beyond a reasonable doubt. The testimonial evidence presented by the prosecution through Kelly McHenry, Kelly's father, Mr. Kompoltowicz, and Officer Gilman establish the elements of stalking.

The prosecution presented evidence that the Defendant engaged in a willful course of conduct involving repeated unconsented to contact with Kelly after having been told on more than one occasion to stay away from Kelly. There is no requirement that Kelly herself tell the Petitioner to stay away from her. Testimony at trial established the Defendant's last attempt to have contact with Kelly left her hysterical, causing Kelly to tremble and cry. This was testified to by Kelly's neighbor, Mr. Kompoltowicz. Therefore, it is clear the prosecution **did make an evidentiary showing of emotional distress,** contrary to the assertions of the Petitioner in his Petition for Writ of Certiorari, page 27.

The Complainant's father told the Petitioner to stay away from Kelly. In addition, Officer Gilman told the Petitioner in June 1994 to stay away from Kelly or he would be prosecuted for stalking. Finally, the fact that Kelly's mother accepted stuffed animals from the Petitioner for Kelly sometime **prior to 1993,** does not mean that the Petitioner could contact Kelly. The animals were left at Kelly's house with Kelly's mother. Kelly was not home at the time. The Petitioner asserts he gave the stuffed animals to Kelly's Mom in 1993 but the trial testimony does not bar this assertion out. In addition, one has to remember

that Officer Gilman testified that he told the Petitioner after that to stay away from Kelly in June 1994.

Based on the undisputed facts presented at trial a rational trier of fact could find the Defendant guilty of stalking beyond a reasonable doubt. Defendants conduct clearly fell within all of the definitions contained in the Ordinance. It cannot be said that the decision of the Michigan Court of Appeals in this case resulted in an adjudication that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court. A state court decision will only be deemed to be an unreasonable application of clearly established Federal law if the state court identifies the correct governing legal principle from this Court, but unreasonably applies that principle to the facts of the Petitioner's case. *Staley v. Jones*, *supra*. In this case the Michigan Court of Appeals correctly identified and applied Federal law governing constitutional challenges of laws on grounds of vagueness and overbreadth.

CONCLUSION

For all the reasons stated and the authority cited herein, Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN DATED JULY 21, 2000

STATE OF MICHIGAN
COURT OF APPEALS

No. 212056
Wayne Circuit Court
LC No. 95-529988-AV

PEOPLE OF REDFORD TOWNSHIP,

Plaintiff-Appellee,

v

MICHAEL JOHN BAK,

Defendant-Appellant.

July 21, 2000

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of misdemeanor stalking in violation of the Redford Township anti-stalking ordinance Ch 58, Art III, § 58-60 (hereinafter "the ordinance"). We affirm.

While he was in his late thirties and early forties, defendant contacted the young female victim on several

separate occasions. The contacts began when the girl was ten and continued until she was fourteen. Several years after the contacts began, plaintiff enacted the ordinance. When the contacts continued after the ordinance's enactment, defendant was arrested, tried, and convicted for misdemeanor stalking.

Defendant first argues that the trial court violated the Ex Post Facto Clauses of the federal and state constitutions, US Const, art I, § 9, cl 3; Const 1963, art 1, § 10, when it admitted evidence of contacts that occurred between defendant and the victim before the township stalking ordinance was enacted. We disagree. A law which affects the prosecution or disposition of criminal cases involving crimes committed before the law's effective date violates the constitutional prohibition against ex post facto laws if the law "(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence." *Riley v. Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).

The ordinance was enacted on June 21, 1993. The following contacts occurred before the ordinance's enactment: (1) defendant's contacts with the victim at basketball games when she was ten years old; (2) defendant's walking or following the victim home from school when she was ten or twelve years old; (3) defendant's requesting permission from the victim's mother to give the victim a stuffed animal; and (4) the victim's father warning that defendant should stay away from his daughter. The remaining contacts, see *infra* at 3, occurred after the ordinance was enacted.

The district court allowed the introduction of testimony regarding those contacts occurring before the ordinance's enactment, ruling that defendant had opened the door to such testimony on cross-examination. The circuit court affirmed, albeit on different grounds.[1] We agree with the district court that defendant opened the door to testimony about the prior contacts. In any event, we note that the jury was specifically instructed that only those contacts that occurred after the ordinance was enacted should be considered for purposes of the offense charged. "[T]he evidence must convince you beyond a reasonable doubt," the trial court instructed, "that the crime occurred between the dates of September, 1993, and September, 1994, within the Charter Township of Redford." A jury is generally presumed to follow the trial court's instructions, until the contrary is clearly shown. *People v. McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). The contrary has not been shown in this case.

Defendant next contends that the township ordinance is unconstitutionally vague and overbroad. We disagree. The ordinance is almost identical to the state stalking statute,

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1. The circuit court relied on *United States v. Poulos*, 895 F2d 1113, 1119-1120 (CA 6, 1990), abrogated on other grounds in *Horton v. California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990), for the rule that a defendant may be convicted of an offense which begins before the law's enactment, but involves conduct continuing after the law's enactment. The circuit court held, "Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for continuing this conduct even after the stalking ordinance came into existence." We do not believe that *Poulos*, which involved the possession of two gun silencer kits that were neither registered nor identified by serial numbers, applies, given the circumstances of the case at hand.

MCL 750.411h; MSA 28.643(8), which we upheld against the same challenges in *People v. White*, 212 Mich App 298; 536 NW2d 876 (1995). For the same reasons set forth in *White*, we conclude that the ordinance here is neither unconstitutionally overbroad nor vague. *Id.* at 308-313.

Defendant also argues that the prosecution failed to present sufficient evidence at trial to support his conviction. We disagree. "In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt." *People v. Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). In order to be convicted of the ordinance at issue, the prosecution is required to prove: (1) that the defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose; (2) that such contacts were initiated without the victim's consent, or in disregard of her expressed desire that such contact be avoided or discontinued; (3) that the unconsented to acts would cause a reasonable person to suffer emotional distress; and (4) that the victim actually suffered emotional distress due to these unconsented to contacts.

The prosecution presented testimony that defendant contacted the victim multiple times, over a long period of time. After the ordinance was enacted, defendant contacted the victim on six separate occasions: (1) in September 1993, defendant approached the victim at a church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994, defendant stared at the victim during several

church services; (3) in March 1994, defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, defendant mailed the victim two unsigned cards; (5) in September 1994, defendant drove slowly by her house; and (6) in September 1994, defendant approached her and tried to speak to her at a church fair, despite her repeated refusals on that occasion to speak to him. We believe on this evidence, a reasonable jury could have found that defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose.

We also believe sufficient evidence was presented to establish the second element of the offense. The township ordinance defines unconsented contact to include "following or appearing within sight of the individual;" "approaching or confronting that individual in a public place or on private property;" or "sending mail . . . to that individual." The evidence produced at trial showed that defendant engaged in each of these types of prohibited contact. Furthermore, the evidence showed that each time defendant attempted to speak to the victim, she either walked away or told him she did not want to speak with him. As for the two unsigned cards sent in March and June 1994, we believe a jury could have reasonably inferred that defendant concealed his identity because he knew that his contacts were unwelcome. Finally, we note that a police officer testified that in June 1994 he warned defendant to stay away from the victim or he would be criminally charged. On this evidence, a jury could have reasonably found that defendant engaged in unconsented contact.

Turning to the two final elements of the offense, we conclude that sufficient evidence was presented to establish

both that the unconsented to acts would cause a reasonable person to suffer emotional distress, and that the victim actually suffered emotional distress due to these unconsented to contacts. Given defendant's age and the victim's age, defendant's repeated attempts to contact the victim, and the victim's knowledge that defendant was not supposed to do so, the jury could reasonably have concluded that a reasonable person in the victim's position would have experienced emotional distress. The evidence also supports a finding that the victim did experience emotional distress. Not only did the victim herself testify that she came to fear defendant's contacts, but the victim's neighbor testified that she was practically hysterical, shaking and trembling after defendant tried to speak with her in September 1994.

Finally, defendant next contends that his trial counsel was ineffective when he failed to include in his motion for directed verdict the argument that the victim's mother consented to defendant's contacts with the victim. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v. Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v. Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[2] hearing, our review of his claim of ineffective assistance of counsel is limited to

2. *People v. Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the existing record. *People v. Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We first take issue with defendant's assertion that the victim's mother had actually consented to the continuing contacts. The record shows that the mother agreed to allow defendant to give her daughter some stuffed animals in 1990. We do not believe the mother's acquiescence to this specific request meant that the mother had granted defendant carte blanche to approach her daughter whenever he wanted. Furthermore, the victim's father testified that it occurred before he warned defendant to stay away from his daughter. Even if defendant's testimony as to the timing of this conversation were believed (defendant claimed the warning came after the conversation with the victim's mother), it should have been clear to defendant from the victim's responses to his contacts that regardless of how he interpreted the contact with the mother, the victim herself had not consented to any contact with defendant. Accordingly, we conclude that because any such motion would have been meritless, defendant has failed to establish that his counsel's assistance was ineffective. See *People v. Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Mark J. Cavanaugh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

APPENDIX B — STALKING ORDINANCE OF THE TOWNSHIP OF REDFORD, § 58-60

Sec. 58-60. Stalking.

(a) As used in this section:

Course of conduct means a pattern of conduct composed of a series of two or more separate noncontinuous acts, evidencing a continuity of purpose.

Emotional distress means a significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

Harassment means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Unconsented contact means any contact with another individual that is initiated or continued without the contacted individual's consent, or in disregard of that individual's expressed desire that the contact is avoided or discontinued.

Appendix B

Unconsented contact includes, but is not limited to, any of the following:

(1) Following or appearing within sight of that individual;

(2) Approaching or confronting that individual in a public place or on private property;

(3) Appearing at the workplace or residence of that individual;

(4) Entering onto or remaining on property owned, leased or occupied by that individual;

(5) Contacting the individual by telephone;

(6) Sending mail or electronic communications to that individual;

(7) Placing an object on or delivering an object to property owned, leased or occupied by that individual.

Victim means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(b) Any person who engages in stalking is guilty of a misdemeanor, and upon conviction is subject to punishment as prescribed in section 1-11 of this Code.

(c) In a prosecution for a violation of this section evidence that the defendant continued to engage in a course

of conduct involving repeated, unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact and to refrain from any further unconsented contact with the victim shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

(d) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

(e) Except as otherwise stated, any person found guilty of any of the foregoing offenses shall be deemed guilty of the commission of a misdemeanor and punished as prescribed in section 1-11 of this Code.

(Ord. No. 161I, § 7, 6-21-93)